First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Appeal Reference: EA/2019/0024

Determined, by consent, on written evidence and submissions.
Considered on the papers on 1 November 2019

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Mr Roger Creedon
and
Mr Dave Sivers

Between

Jonathan Corke

Appellant

and

The Information Commissioner

1st Respondent

and

Department of Education

2nd Respondent

DECISION AND REASONS

BACKGROUND

1. On 20 February 2018, the Appellant wrote to Department for Education (DfE) and requested information in the following terms:-

> Please provide copies of all briefings for Nick Gibb between February 12, 2018, and February 16, 2018, which relate to plans for new multiplication tests for primary school children.

2. The background to the request is the inclusion of the recall of multiplication facts in the national curriculum (2014) statutory programme of study for mathematics at key stage 1 (KS1) and key stage 2 (KS2).The Multiplication Tables Check (MTC) is a key stage 2 (KS2) assessment to be taken by primary school pupils at the end of year 4 when most of the children will be aged eight or nine, to check whether pupils can recall their multiplication tables. The DfE says that the test is short and easy to administer and will help teachers to identify those pupils who may need more support in mastering their times tables.

3. At the time of the request a national voluntary pilot was due to take place over a three week period between 10 June and 28 June 2019. Schools could use this to familiarise themselves with the check before it becomes statutory in June 2020.

4. The announcement of the MTC trial was made by the minister on 14 February 2018. We are told (see the decision notice at paragraph 14) that the launch of the voluntary pilot of the MTC led to widespread media coverage, with the minister (Nick Gibb) being interviewed live on TV, as well as articles appearing in the press.

5. On 17 April 2018 DfE responded to the Appellant's request and refused to

provide the requested information. DfE cited section 36(2)(b)(i) and (ii) FOIA and 36(2)(c) FOIA as its basis for doing so (see below).

6. Following an internal review DfE wrote to the Appellant on 31 May 2018 and maintained its original decision not to disclose the information.

7. The Appellant contacted the Commissioner on 20 June 2018 to complain about the way his request for information had been handled.

8. The Commissioner issued a decision notice on 31 January 2019 in which she considered whether DfE were entitled to rely on section 36(2) FOIA to withhold the requested information.

THE LAW

9. We will return to the decision of the Commissioner below. However, it is appropriate at this stage to set out the relevant parts of section 36 FOIA and the law which relates to its applicability. Section 36 FOIA reads materially in this case as follows: -

> **36.— Prejudice to effective conduct of public affairs.**
> (1) This section applies to—
> (a) information which is held by a government department… and is not exempt information by virtue of section 35, and
> (b) …
> (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
> (a) …
> (b) would, or would be likely to, inhibit—
> (i) the free and frank provision of advice, or
> (ii) the free and frank exchange of views for the purposes of deliberation, or
> (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

10. By s36(2)(5) FOIA a Minister of the Crown such as Mr Gibb would be a 'qualified person' for a government department such as the DfE.

11. The relevant part of section 36 FOIA is not one of the exemptions excluded from the 'public interest' test, and therefore, by section 2 FOIA:-

> (1)..
> (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) [the right to have information communicated] does not apply if or to the extent that—
> (a) …
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

12. In *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) the UT provided and analysis of s36 FOIA and its applicability as it relates to the circumstances of this case. At paragraphs 28 and 29 of the UT's judgment is this:-

> 28. The starting point must be that the proper approach to deciding whether the QP's opinion is reasonable is informed by the nature of the exercise to be performed by the QP and the structure of section 36.
>
> 29. In particular, it is clear that Parliament has chosen to confer responsibility on the QP for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect. As Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55):
> "It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates."

13. The UT then continues to describe the two stages involved in deciding whether information is exempt under s36 FOIA at paragraph 31:-

> 31…..first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition ("prejudice") would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

14. The UT then emphasised that the 'QP is not called on to consider the public interest for and against disclosure…the QP is only concerned with the occurrence or likely occurrence of prejudice' (paragraph 32). Going on, the UP explains:-

> 32…The threshold question under section 36(2) does not require the Information Commissioner or the FTT to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal).
>
> 33. Given the clear structural separation of the two stages, it would be an error for a tribunal to consider matters of public interest at the threshold stage.

15. The UT also decided that when considering whether the QPs opinion was reasonable 'we conclude that "reasonable" in section 36(2) FOIA means substantively reasonable and not procedurally reasonable' (paragraph 57).

<u>THE QP's OPINION IN THIS CASE</u>

16. The QP in this case was the Minister Nick Gibb. The DfE provided the QP with a submission in relation to the s36 FOIA exemption, and the QP signed a statement as follows:-

> I confirm that, in my reasonable opinion as a qualified person, disclosure of the information under the Freedom of Information Act 2000 would be likely to have the effect set out in section 36 (2) (b) (i), (ii), and s36(2)(c) of that Act.

17. The qualified person's opinion is dated 30 March 2018.

18. There is a redacted version of the submission to the QP in the open bundle. The submission recommends that the Minister agrees that:-

> ….subject to a public interest test, the information requested should be exempt from disclosure under s36, because in his reasonable opinion, disclosure of it under the Act would be likely to inhibit the process of provide free and frank advice to government or would be likely to otherwise prejudice, the effective conduct of public affairs.

19. The relevant submission sets out the provisions of s36(2) FOIA, and states that 'we propose withholding the information on these grounds' and then notes that section 36 FOIA is a qualified exemption subject to the public interest test.

20. The submission has been redacted in places, but the unredacted part goes on to say, that:

> On one hand, there is a general public interest in disclosing the [requested information]**.** Knowledge of the way Government works increases if the information on which decisions have been made is available. Disclosure of the briefings also promotes openness and transparency of information, which can lead to public contribution to the policy making process to be more effective. There is a general public interest in being able to see if Ministers are being briefed effectively on the key areas of policy the Department is taking forward.

21. Against this the unredacted part of the submission states that:-

> However, on the other hand, there are also arguments in *favour* of

non-disclosure, by virtue of the exemptions under S36(2)(b)(i) and (ii) of the Act. Disclosure of the MTC evidence note would inhibit the ability of officials to express themselves openly, honestly and completely when providing advice or giving their views as part of the process of deliberation.

22. The redacted part of the submission then provides some specific details about the information at issue in this case and then, unredacted, states:-

> In order to allow a safe space for deliberation to take place openly and frankly on these outstanding questions, officials should feel safe to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
>
> Disclosure of the MTC evidence note would also make it more likely that the person or any other person offering advice will be unwilling to provide open and honest advice in the future - a 'chilling effect'. The possibility of disclosure will make it likely that advice will be given over-cautiously to the detriment of the quality of advice, and is likely to deter public authority staff and others to provide open and frank advice in the future.

23. There is then a redacted part of the submission which relates specifically to more of the requested information, before this which is unredacted:-

> Disclosure of [ ] briefing notes can also be exempt by virtue of S36(2) (c) of the Act, which states that information can be exempt if disclosure would prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. We believe that disclosure would be likely to prejudice the effective conduct of public affairs by revealing the inner workings of the Department. The [ ]are internal documents for use by the Minister only, and we do not believe that there is a public interest in revealing the inner workings of the Department.
>
> lf the Minister agrees with the recommendation, a public interest test based on the factors outlined here will be carried

> out. The information that is requested to be withheld has been itemised….

24. In its response to the Appellant on 17 April 2018, the DfE said that the 'public interest consideration for withholding the information was greater than the general public interest considerations' which it had outlined in the response.

THE DECISION NOTICE

25. The Commissioner's decision notice of 31 January 2019 rehearses the arguments raised in the submission to the Minister. The Commissioner identifies a 'ministerial Q&A ahead of media engagements' as one of the withheld documents (see paragraph 29) and 'the briefing paper' as the other (see paragraph 27). From the wording of the request we know that both must have been produced between 12 February 2018 and 16 February 2018. As noted above the minister announced the MTC trial on 14 February.

26. In relation the Q&A briefing, the Commissioner recorded the DfE's further arguments as follows:-

> 29. The DfE said that a ministerial Q&A ahead of media engagements is by its very nature a free and frank exchange of views drawn together by officials for ministers to deliberate ahead of such engagements. Officials and ministers will often question key points raised in these Q&As, providing different questions and/or responses, before the final draft of the Q&A is agreed, embedded and used.
>
> 30. DfE therefore considered there is sensitivity around identifying such Q&A briefings, particularly when the issues highlighted are 'live' at the time of the FOI request and are still 'live' at date of this response. Officials, ministers and the department must be able to have a 'safe space' to develop their arguments, evidence and defence when launching such new policy initiatives.

27. The DfE argued that the official who had prepared the briefing paper and the Q&A briefing which were within scope of the request would not have been so frank and candid in the advice he provided to the minister if it had been known that it would be disclosed, and that the official who presented advice to the minister believed that it would not be placed in the public domain. The timing of the request and the ongoing 'live' nature of the policy were raised, and the DfE said that that as part of effective government, ministers are provided with such briefings and Q&A papers ahead of any policy announcement and subsequent media engagements. This allows ministers time to consider the views and opinions provided by officials, and to consider, deliberate and question any statements or Q&A provided, requesting further information, support or advice where required.

28. Accepting the DfE arguments, the Commissioner decided that_

> 31. Having inspected the withheld information, the Commissioner is satisfied that it was reasonable for the qualified person to conclude that disclosure would pose a real and significant risk to the free and frank exchange of views between officials and ministers. Furthermore, the matter was still live at the time of the request, and has yet to be piloted.
>
> 32. The Commissioner considers that disclosure would be likely to hinder free and frank provision of advice and deliberations and that section 36(2)(b)(i) and (ii) is engaged.

29. The Commissioner said that she had not considered the exemption in section 36(2)(c) FOIA as she was satisfied that section 36(2)(b) FOIA applied to the entirety of the withheld information.

30. Going on to consider the public interest in maintaining the exemption the Commissioner said that she would consider the impact on the DfE's ability

to deliberate on any future options and on the willingness of individuals to engage in any debate and offer opinions.

31. The Commissioner identifies a general public interest in disclosure of information to demonstrate the openness and transparency of government. She also refers to the importance in the public having access to information that would allow them to reach their own opinion on the robustness and integrity of a fair decision-making system.

32. In relation to the public interest in maintaining the s36 FOIA exemption the Commissioner lists the DfE concerns set out above about the need for officials to feel confident about providing full and frank advice on sensitive issues, and the risk to this process, and effective decision-making, if it is thought that information about it would be disclosed, especially where the issue is still 'live'. The Commissioner recognises the concerns and says the question is whether 'this inhibition is likely to be severe and frequent enough to outweigh any public interest in disclosure'.

33. The Commissioner concludes that the 'safe space' and 'chilling effect' arguments raised by the DfE provide the basis for a greater public interest (in non-disclosure) than do the arguments in favour of disclosure. The Commissioner emphasises that:-

> 52….The chilling effect argument will be strongest when an issue is still live. In this case the MTC has not yet been formally implemented and is due to be piloted later this year. Therefore the matter is still very much live and the Commissioner considers that disclosure would mean that officials would be likely to be less candid in the provision of advice, the free and frank exchange of views for the purpose of deliberation and more widely in relation to the general conduct of this or similar matters in the future.

THE APPEAL

34. The Appellant's appeal is dated 31 January 2019. A main point raised is that the Commissioner has failed to give any weight when carrying out the public interest balance to the fact that the decision to introduce the new tests was controversial, citing concerns expressed by the teaching profession. He raised the point that officials and ministers should have no concern about disclosure if they have been acting fairly, impartially and professionally. The Appellant also argues that public officials who were less candid because previous briefings had been disclosed would be failing to carry out their duties, and that they would be aware that the FOIA made this a possibility in any event. The Appellant also raises the public interest in the briefings as Mr Gibb declined to take the test that he expects children to take.

35. He also queries whether Mr Gibb as the minister for whom the briefings were prepared should have been the QP in this case.

36. Finally the Appellant argues that at least some information can be disclosed without withholding an entire information set.

DECISION

The application of the exemption

37. We agree with the Commissioner that there is nothing in the guidance or case law which means that the QP cannot be the Minister for whom briefings are prepared, and the decision by the Commissioner to accept the Minister's opinion as a QP therefore involved no discernible error of law.

38. We also agree with the Commissioner that the QP's opinion was reasonable in public law terms and that the exemptions in s36(2)(b) FOIA

therefore apply. The Appellant's appeal does not challenge the Commissioner's decision in relation to this. We have not at this stage carried out any assessment of what level of likelihood we think there is that prejudice will be caused by the disclosure of the withheld information considered by the QP, nor any assessment of the seriousness of the prejudice caused. Those are assessments, as the UT in *Malnick* tells us, to be carried out during the public interest part of the analysis.

Public interest

39. In considering the public interest aspect of the case, we note that we must take into account the QP's reasonable opinion as to the occurrence or likely occurrence of prejudice if the material is disclosed. We also note the QP in reaching his opinion was not called on to consider the public interest for and against disclosure . Further, we note that Lloyd Jones LJ in the case of *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55) states that 'appropriate consideration' should be given to the QP's opinion 'at some point' in the process of balancing competing public interests.

40. That raises the question as to when exactly we should take the QP's opinion into account. It seems to us that a sensible approach is for the Tribunal to consider first of all where, provisionally, absent the QP's opinion, the public interest balance lies. Once that provisional view has been reached, the Tribunal can then take into account the QP's opinion and see if that changes the provisional view.

41. If the provisional view of the Tribunal is that the public interest balance does not favour disclosure, then it is very likely that 'appropriate consideration' of the QP's opinion will reinforce that view. However, if we form the provisional view that the public interest favours disclosure,

then we should give 'appropriate consideration' to the QP's opinion to see if that consideration changes the provisional view. In carrying out this exercise we bear in mind that Lloyd Jones LJ stated in the *Department for Work and Pensions* that '…the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates'.

42. As did the Commissioner, we have viewed the withheld material and note that the Commissioner has identified two documents in the decision notice: a briefing paper and a Q&A briefing paper for use by the Minister when answering questions about the issues.

43. We recognise the 'safe space' and 'chilling effect' arguments relied upon by the Commissioner as important considerations when considering the public interest.

44. Having said that, there is considerable force in the Appellant's argument that public officials who are less candid because previous briefings had been disclosed would be failing to carry out their duties, and that they would be aware that the FOIA made disclosure a possibility in any event. It seems to us to be important to emphasise that a decision in a particular case that the public interest favours the disclosure of documents, despite these arguments (especially in relation to the 'chilling effect'), does not mean that the Tribunal is finding that all briefing papers or Q&A documents, for example, will be disclosed in the future. Everything depends on the context of the particular case.

45. In this case, the Q&A briefing, in our view, contains a list of unsurprising questions that the Minister might be asked by the media and a response to each question which it is proposed he should give. In effect, this is what is proposed is put in the public domain by the Minister if the questions are asked. In a recent FTT case, *Silverman v IC and Department of the*

Environment EA/2019/0097 (12 August 2019) the Tribunal commented, in relation to a similar briefing at paragraph 11:-

> If the Department considered it appropriate at the time of preparing the briefing that information could be put into the public domain by the Minister it is difficult to see that it had the sensitivities claimed when the request was made for disclosure of the information some months later.

46. We are not bound by that approach, of course, but it certainly chimes with our view in the present case.

47. Unlike in the *Silverman* case, however, the Appellant made his request for the information in relation to documents produced only a matter of days earlier. But it was not until 17 April 2018 that the DfE responded to the request and not until 31 May 2018 that the DfE communicated the result of its internal review to the Appellant. The most recent judgment of the Upper Tribunal, *Maurizi v ICO* GIA/973/2018, confirms that the date of the response is the correct date when considering public interest issues.

48. Thus, in this case the response date of 17 April 2018 was almost two months after the briefings had been produced. By that time any immediate media interest in the issues covered in the Q&A briefing would have been exhausted or significantly cooled. Although the introduction of the tests remained a 'live' issue, it is our view that disclosure of the actual Q&A briefing two months after its production would not threaten the 'safe space' within which officials need to work, or have a 'chilling effect' on the contents of Q&A briefings – intended for public dissemination in any event.

49. At paragraph 41 of the decision notice the Commissioner records DfE concerns that:-

> '…all parties should be able to follow a process which allows them

> to speak freely and frankly and be able to challenge media briefings and Q&As to ensure that issues are debated widely and that final versions are based on broad and balanced evidence. If there is a risk that the process of developing and delivering sensitive initial drafts, which are exchanged between officials and ministerial private offices, may be opened up to public scrutiny, departmental officials may be less likely to enter openly into the discussion, resulting in a reduction in quality of the final advice provided.

50. We further note that the DfE had submitted to the Commissioner that:-

> Although we do not believe that departmental officials would be deterred from providing advice via such briefing papers, there is a risk that the messages within these papers could be more guarded or become diluted and such provisions of advice may not be as candid and forthright as they are at present. This in turn wold lessen the impact of such papers and their advice ahead of ministerial media engagements.

51. Those concerns may or may not be well-founded, but in this case the Appellant has not requested initial drafts or evidence of internal debates on the issues. All he has requested (and all that has been withheld) is the actual briefings themselves. There is no danger in this case that the process by which the a Q&A briefing came to be finalised will be revealed by disclosure, because information relating to that process has not been requested.

52. In relation to the briefing paper (as opposed to the Q&A briefing) it provides background information to the issue for the Minister. The paper provides details of the development of the policy, contains some comparative information, makes reference to some research on the issue, and provides details of some unsurprising opinions supporting (or not) the policy.

53. Once again, in our view there is no 'risk that the process of developing and delivering sensitive initial drafts, which are exchanged between officials and ministerial private offices, may be opened up to public scrutiny',

because all that has been requested is the actual briefing itself. On that basis the 'safe space' required by officials and Ministers to develop ideas and policies is not under threat to any significant extent if there is disclosure, and in our view disclosure of this briefing paper is very unlikely to have the claimed 'chilling effect' on the contents of briefing papers in the future. We emphasise that that is a conclusion that we have reached on the contents of this briefing paper, and it is entirely possible that the contents of other briefing papers would be more controversial and there would be far more justifiable concerns about their disclosure.

54. Once again, in relation to this being a request for a briefing paper on a 'live' issue, the response to the request was made almost two months after the briefing paper was produced. Although voluntary pilots were not due to take place until June 2019, the government decision that online checks would be undertaken in the 2019/20 academic year had already been taken and announced, and to that extent this is a briefing document on a settled policy, albeit one yet to come to fruition. In our view, considering the contents of this particular briefing document (as listed above), the fact that it relates to the ongoing introduction of a policy makes little difference to our conclusions. Again we can imagine other briefing documents in other policy areas where such conclusions might not be reached.

55. We also agree with the Appellant that this is a subject area which attracts a lot of public controversy, and that the Commissioner has not taken this fully into account in the decision notice. There is a strong and obvious public interest in disclosing, where possible, information about the development of education policies.

56. However, there is no public interest, in our view, in the disclosure of the information on the basis that the Minister has, it is said, declined to take the test himself.

57. Thus, we agree with the Commissioner that it is important and in the public interest that the process of decision-making and advice giving is not undermined or made less effective. We agree that it is important for officials not to lose the safe space to discuss matters between themselves and with ministers, and important that there is not a chilling effect on officials performing their proper functions. However, we disagree, for the reasons discussed above, that disclosure of this particular information will be likely to have those outcomes, and we find that the views expressed to the contrary have been overstated.

58. Thus, our provisional view, prior to taking into account the QP's opinion on prejudice is that the public interest is in favour of disclosure. We now must take the QP's opinion into account and decide if it tips the balance in favour of non-disclosure.

59. In considering this exercise, we note that the UT (and Lloyd Jones LJ in the *DWP* case) appear to envisage that the QP's opinion on likelihood of prejudice and the subsequent consideration of the public interest will involve the assessment of two different sets of factors. However, in this case the issues relied upon when considering prejudice (the need for a safe-space and the risk of a chilling effect), are in fact more or less repeated as public interest factors which are said to support withholding the information.

60. In considering these factors as part of the public interest balance, the Tribunal has differed from the opinion of the Commissioner as to the weight that should be given to the risk to the 'safe space' and the risk of the 'chilling effect' if the requested material is disclosed.

61. Our views on these issues, therefore, are also applicable to our consideration of the QP's opinion on the likelihood of prejudice if the withheld information is disclosed. We would differ from the QP's opinion

that such prejudice is likely. The QP's opinion on likelihood is not unreasonable, but it is not one which this Tribunal would have reached on the evidence available, for the reasons set out above.

62. Thus, even having given appropriate weight to the QP's opinion on the likelihood of prejudice, the Tribunal is of the view that the public interest in this case is in favour of disclosure of the information.

SECTION 36(2)(c) FOIA

63. The Commissioner decided not to consider the exemption claimed by the DfE under s36(2)(c) FOIA on the basis that she was satisfied that non-disclosure was justified under s36(2)(a) and (b). Having reached a different conclusion on that issue, we should now also consider s36(2)(c) FOIA. As the UT explained in *Malnick*:-

> 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… 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.

64. Thus, by s32(2)(c) FOIA:-

> (2) Information …is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
> (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

65. In the DfE submission to the QP in relation to the s36(2)(c) FOIA exemption, it is said that 'We believe that disclosure would be likely to prejudice the effective conduct of public affairs by revealing the inner workings of the Department. The [ ] are internal documents for use by the Minister only, and we do not believe that there is a public interest in revealing the inner workings of the Department'.

66. In our view, this adds little or nothing to the 'safe space' and 'chilling effect' arguments raised for the purposes of s36(2)(a) and (b) FOIA. FOIA requests are very often about revealing the 'inner workings' of public authorities, and it is almost always accepted that there is a public interest in transparency as to how decisions are made and as to the contents of documents. The submission does not actually explain how revealing the 'inner workings' would prejudice the 'effective conduct of public affairs'. Adopting the same approach as before, and taking account the points made above, we do not find that QP's opinion is unreasonable (and therefore the exemption is engaged. However, on the particular facts of this case we would be of the provisional view (prior to taking the QP's opinion into account), that the public interest in disclosure outweighs any public interest in not 'revealing the inner workings of the Department'. Although the QP's opinion is not unreasonable, we would not have reached the same decision, on the facts, as did the QP. Therefore the weight we give to his on the likely prejudice to the effective conduct of public affairs is limited, and it remains our view that the public interest favours disclosure.

67. Finally, the briefing paper includes at the end the name of the departmental official. In our view, applying s40(2) FOIA, this is personal data that should not be disclosed, on the basis that more junior officials have a reasonable expectation that their personal information will not be disclosed, and that disclosure would not be fair or lawful. No legitimate

interest reason for disclosure has been put forward by the Appellant, who has not expressed an interest in the name of the author of the briefing paper.

68. For these reasons, and subject to the redaction discussed at paragraph 67 above, the appeal is allowed. For the reasons stated this appeal is allowed and this judgment is substituted for the Commissioner's decision notice.

69. The next step is for DfE to make the relevant redaction for the purposes of s40(2) FOIA , before disclosure to the Appellant is made.

Signed Stephen Cragg QC

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 22 November 2019

Promulgation date: 26 November 2019