Neutral citation number: [2023] UKFTT 733 (GRC)

Case Reference: EA/2022/0367

**First-tier Tribunal**
**General Regulatory Chamber**
**Information Rights**

**Heard by: remote video hearing (cloud video platform)**

**Heard on: 5 May 2023**
**Decision given on: 12 September 2023**

**Before**

**TRIBUNAL JUDGE STEPHEN ROPER**
**TRIBUNAL MEMBER AIMÉE GASSTON**
**TRIBUNAL MEMBER PAUL TAYLOR**

**Between**

**ARTICLE 39**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Representation:**
For the Appellant: Carolyne Willow
For the Respondent: did not appear and was not represented

**Decision:** The appeal is Allowed

**Substituted Decision Notice:**

The Tribunal's Decision Notice in case reference EA/2022/0367, set out below, is substituted for the Commissioner's Decision Notice reference IC-166075-L8N4 dated 20 October 2022 with regard to the request for information made to the Department for Education by Article 39 dated 6 December 2021.

*Substituted Decision Notice*

1. The Department for Education breached section 10 of the Freedom of Information Act

2000 by not responding to the request for information within twenty working days.

2. The Department for Education is not entitled to rely on section 36(2)(c) of the Freedom of Information Act 2000 to withhold the requested information because, whilst that section is engaged, the public interest favours disclosure.

3. The Department for Education must disclose the withheld information which was provided to the Tribunal, subject to any redactions of personal data pursuant to section 40(2) of the Freedom of Information Act 2000.

4. The Department for Education must disclose the withheld information (subject to any such redactions) within 30 days of the date on which the Information Commissioner sends them notification of this decision in accordance with the Directions below.

5. Failure to comply with this decision may result in the Tribunal making written certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 and may be dealt with as a contempt of court.

*Directions*

6. The Information Commissioner is directed to send a copy of this decision to the Department for Education within 28 days of its promulgation, or (if the Information Commissioner applies to appeal this decision) within 14 days after there is an unsuccessful outcome to such application or any resulting appeal.

7. The previous directions of the Tribunal issued pursuant to rule 14 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 preventing or restricting the disclosure of the withheld information shall cease to apply at the point of its disclosure in accordance with the above Substituted Decision Notice.

## REASONS

### Preliminary matters

1. In this decision, we use the following abbreviations to denote the meanings shown:

| | |
|---|---|
| Appellant | Article 39 (a charity). |
| Commissioner: | The Information Commissioner. |
| Complaint: | The Appellant's complaint to the Commissioner relating to the DfE's response to the Request (as referred to in paragraph 12). |
| Decision Notice: | The Decision Notice of the Information Commissioner dated 20 October 2022, reference IC-166075-L8N4. |
| DfE: | The Department for Education. |
| FOIA: | The Freedom of Information Act 2000. |
| Ministerial Submission: | The internal submission of the DfE seeking the |

| | |
|---|---|
| | opinion of a qualified person for the purposes of the exemption in section 36(2)(c) of FOIA, as referred to in paragraph 60. |
| Panel: | The Child Safeguarding Practice Review Panel, as referred to in the Request. |
| Public Interest Test: | The test as to whether, in all the circumstances of the case, the public interest in maintaining an exemption outweighs the public interest in disclosing the information, pursuant to section 2(2)(b) of FOIA (set out in paragraph 32). |
| Report: | The report (or analysis) which was requested by way of the Request. |
| Request: | The request for information made to the DfE by the Appellant dated 6 December 2021, more particularly described in paragraph 8. |

2. We refer to the Commissioner as 'he' and 'his' to reflect the fact that the Information Commissioner was John Edwards at the date of the Decision Notice, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the date of the Request.

3. Unless the context otherwise requires (or as otherwise expressly stated), references to numbered paragraphs are to paragraphs of this decision so numbered.

## Introduction

4. This was an appeal against the Decision Notice, which (in summary[1]) held that the DfE could rely on section 36(2)(c) of FOIA (prejudice to effective conduct of public affairs) in order to withhold the Report. The Decision Notice did not require the DfE to take any steps.

## Mode of Hearing

5. The proceedings were held by the cloud video platform. The Tribunal panel and the parties all joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

6. The Appellant was represented by Carolyne Willow, a director of the Appellant. The Commissioner did not attend the hearing and was not represented.

## Background to the appeal

7. The background to the appeal is as follows.

### *The Request*

8. On 6 December 2021, the Appellant made a request to the DfE for information in the

[1] See paragraphs 13-18 for more detail.

following terms:

"*This is a Freedom of Information Act request. Please provide a copy of the analysis (draft and/or final report) conducted by the Child Safeguarding Practice Review Panel of 48 incidents where children became looked after as a result of abuse or neglect (drawn from 89 cases where a looked after child had died or suffered serious harm). A summary of key findings from this analysis was reported in the Panel's annual report 2020 (page 24), published in May 2021.*".

***The reply and subsequent review***

9. The DfE responded on 22 February 2022. It stated that the requested information was exempt under section 36(2)(c) of FOIA. (In respect of that exemption, a qualified person's opinion was required, as we note below. The qualified person - a Minister – who gave their opinion in connection with the Request was Will Quince, who at that time was Parliamentary Under Secretary of State at the DfE.)

10. On 28 February 2022, the Appellant requested an internal review of the DfE's handling of the Request.

11. The DfE provided the outcome of its internal review on 4 April 2022. It upheld its original position.

12. The Appellant contacted the Commissioner on 14 April 2022 to complain about the DfE's response to the Request. The Appellant alleged that the DfE, in refusing the Request and relying on section 36(2)(c) of FOIA, failed to consider the potential impact on the protection of highly vulnerable children when undertaking the Public Interest Test. The Appellant also contended that there was no evidence that the Public Interest Test was undertaken at all in the DfE's internal review.

***The Decision Notice***

13. The Commissioner decided, by way of the Decision Notice, that:

    a. section 36(2)(c) of FOIA (prejudice to effective conduct of public affairs) was engaged in respect of the requested information;

    b. the public interest favoured maintaining that exemption; and

    c. accordingly, that the DfE could rely on section 36(2)(c) of FOIA (prejudice to effective conduct of public affairs) in order to withhold the requested information.

14. The Commissioner noted in the Decision Notice that the DfE's had explained that the Report was part of an internal scoping exercise conducted by the Panel (and was accordingly not a national review) and it had been provided to the DfE in strict confidence. The Decision Notice also noted the DfE's comments that disclosure under FOIA would be likely to damage trust and the working relationship between the DfE and the Panel, including that it was likely the Panel would be less willing to share information with the DfE.

15. The Commissioner was satisfied that the opinion provided by the Minister, that the disclosure of the Report would be likely to prejudice the effective conduct of public

affairs, was a reasonable opinion. Therefore the Commissioner accepted that section 36(2)(c) of FOIA was engaged.

16. In respect of the Public Interest Test, the Commissioner considered the public interest in favour of disclosure of the Report - namely that disclosure "would provide an insight into the practice themes the Panel see in rapid reviews and would demonstrate how the Panel analyse the evidence submitted to them (in confidence by Safeguarding Partners) and their response to the issues identified i.e., whether a National Review is required".

17. However, the Commissioner noted that a summary of the Report had been produced in the Panel's 2020 annual report. He further noted the DfE's concerns with regards to sensitive nature of the content of the Report, the risk of identification of the relevant children, and the other mechanisms by which learning points are publicised.

18. The Commissioner concluded that, in the circumstances, the DfE had proactively published information about the relevant scoping exercise and had provided the Appellant with as much contextual information as possible without jeopardising the free flow of information between the DfE, panel and local authorities. The Commissioner therefore agreed with the DfE that disclosure of the Report would be likely to damage the relationship between the DfE and the Panel, and potentially local authorities, which would be likely to prejudice the effective conduct of public affairs.

## The appeal

### *Grounds of appeal*

19. In essence, the Appellant submitted that the Report should be disclosed on the grounds that:

    a. Children in care are among the most vulnerable in society.

    b. The incidents referred to in the report were sent to the Panel by local authorities in accordance with statutory child safeguarding guidance (which guidance also stated that the information may be shared with the DfE).

    c. The DfE is responsible for government policy relating to child protection and relating to the safety and well-being of children in care.

    d. Whilst the DfE had stated that the Report had been provided 'in strictest confidence', the Panel only exists in order to promote learning and improvements in child protection. Publication of the report would be consistent with both the Panel's function and with the obligations of the DfE.

    e. It is common practice for reports to be published - through local child safeguarding practice reviews, coroners' reports and national reviews - which contain highly sensitive information about children (both who have died and who are still living), including relating to the deaths and serious harm of individual children. The DfE had not offered to release the Report with redactions to prevent disclosure of any personal data.

    f. Analysis of the separate incidents referred to in the Report where children in care

died or suffered serious harm is likely to have identified themes and patterns which could inform national policy within the DfE and across the health and criminal justice system.

g. The Commissioner did not address various factors put forward by the App, as part of the Complaint, in favour of disclosure of the Report.

20. Various additional submissions were made by the Appellant in support of the appeal (including pursuant to a skeleton argument which was filed with the Tribunal). The material points were addressed on behalf of the Appellant at the hearing and we refer to the relevant submissions below.

***The Commissioner's response***

21. The Commissioner considered that the Appellant's appeal related to the Public Interest Test.

22. The Commissioner maintained the position set out in the Decision Notice – namely (in summary) that the DfE could rely on section 36(2)(c) of FOIA in order to withhold the Report. The Commissioner contended that the Appellant failed to set out in the grounds of appeal why the Decision Notice was not in accordance with the law or that the Commissioner ought to have exercised his discretion differently. Whilst relying on his reasoning in the Decision Notice, the Commissioner also made the following submissions:

a. The Commissioner continued to recognise the public interest in matters relating to the safeguarding of children. The Commissioner also recognised the Appellant's arguments regarding the various duties and practices of the Panel and the DfE with regard to safeguarding children and publishing information.

b. However, the Panel had clearly decided not to publish the Report (including deciding not to anonymise it) notwithstanding that the Panel may publish various other information. The Appellant appeared to accept that the Panel was not required to send the Report to the DfE. Therefore a disclosure under FOIA, against the Panel's request for the Report to be treated in strict confidence, would be likely to prejudice the working relationship between the DfE and the Panel, and potentially local authorities, which would not be in the public interest. The Commissioner considered that this was the "central issue" in the appeal.

c. The Appellant could request a copy of the Report directly from the Panel or ask the Panel to give the DfE permission to release it. This would then likely not result in any prejudice to the working relationship between the Panel and the DfE. In the absence of any such permission, there would be likely be the stated impact on the working relationship between the Panel and the DfE which would be detrimental to the effective conduct of public affairs.

d. The qualified person's opinion was reasonable and the public interest favours maintaining the exemption. This was particularly the case given the other related information that had been published.

e. As the DfE was not the author of the Report and the Report was provided to it in confidence, the fact that the DfE is responsible for relevant government policy,

and has not offered to anonymise the Report does not shift the balance of public interest.

***The Appellant's reply***

23. In reply to the Commissioner's response, the Appellant denied that its appeal related only to the Public Interest Test. The Appellant referred to the "two-stage process" regarding the application of the exemption in section 36 of FOIA, involving the 'threshold stage' (of the qualified person's reasonable opinion) followed by a public interest balancing exercise.

24. In respect of the 'first stage', the Appellant submitted that the Commissioner erred in too readily accepting that the qualified person's opinion was a reasonable one in respect of the alleged prejudice claimed by the exemption. This was so notwithstanding that the qualified person's opinion is entitled to a measure of respect (see paragraph 39).

25. In respect of the 'second stage' (assuming that the 'first stage' was passed) the Appellant contended that the public interest in disclosure far outweighed the public interest in maintaining the exemption. The Appellant considered that the Commissioner erred in not considering the substantial weight of child protection arguments for disclosure.

26. Again, various additional submissions were made by the Appellant and we refer to the material points below in in respect of the matters addressed on behalf of the Appellant at the hearing.

## The Tribunal's powers and role

27. The powers of the Tribunal in determining this appeal are set out in section 58 of FOIA, as follows:

"*(1) If on an appeal under section 57 the Tribunal considers –*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may Review any finding of fact on which the notice in question was based.*".

28. In summary, therefore, the Tribunal's remit for the purposes of this appeal is to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts.

## The law

### *The statutory framework*

*General principles*

29. Section 1(1) of FOIA provides individuals with a general right of access to information held by public authorities. It provides:

> "A*ny person making a request for information to a public authority is entitled –*
>
> *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
>
> *(b) if that is the case, to have that information communicated to him.*".

30. In essence, under section 1(1) of FOIA, a person who has requested information from a 'public authority' (such as the Appellant) is entitled to be informed in writing whether it holds that information. If the public authority does hold the requested information, that person is entitled to have that information communicated to them. However, these entitlements are subject to the other provisions of FOIA, including some exemptions and qualifications which may apply even if the requested information is held by the public authority. Section 1(2) of FOIA provides:

> "*Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.*".

31. It is therefore important to note that section 1(1) of FOIA does not provide an unconditional right of access to any information which a public authority does hold. The right of access to information contained in that section is subject to certain other provisions of FOIA.

32. Section 2(2) of FOIA is applicable for the purposes of this appeal, as a potential exemption to the duty to provide information pursuant to section 1(1)(b) of FOIA. Section 2(2) of FOIA provides:

> "*In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –*
>
> *(a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
>
> *(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*".

33. The effect of the above is that some exemptions set out in Part II of FOIA are absolute and some are subject to the application of the Public Interest Test. Where an applicable exemption is not absolute and the Public Interest Test applies, this means that a public authority may only withhold requested information under that exemption if the public interest in doing so outweighs the public interest in its disclosure.

34. Section 2(3) of FOIA explicitly lists which exemptions in Part II of FOIA are absolute. Pursuant to that section, no other exemptions are absolute. Section 36 is not included

in that list.

35. Accordingly, in summary, the applicable exemption for the purposes of this appeal (in section 36 of FOIA) is a qualified exemption, so that the Public Interest Test has to be applied, even if that section is engaged.

*Section 36*

36. So far as is relevant for the purposes of this appeal, section 36 of FOIA provides:

"*(1) This section applies to –*

*(a) information which is held by a government department…and is not exempt information by virtue of section 35…*

*(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –*

*…*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*

*(5) … "qualified person" –*

*(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown…*".

37. In summary, therefore, for the purposes of this appeal, the above provisions of section 36 of FOIA provide that (subject to the Public Interest Test) the Report is exempt from disclosure if, in the reasonable opinion of a Minister of the Crown, disclosure of it would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

## *Relevant case law*

*Section 36*

38. Whether the exemption under section 36 of FOIA is engaged depends on the 'reasonable opinion' of the qualified person (section 36(2) of FOIA, as set out above). This means substantively reasonable and not procedurally reasonable, as established in the case of *Information Commissioner v Malnick and ACOBA*[2].

39. In the *Malnick* case, the Upper Tribunal also made the following observations regarding the opinion of the qualified person[3]:

"*In particular, it is clear that Parliament has chosen to confer responsibility on the QP*[4] *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*

[2] [2018] UKUT 72 (AAC), paragraphs 51-56.
[3] Paragraph 29 of that case.
[4] (Qualified Person for the purposes of section 36 of FOIA.)

*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… it is to be afforded a measure of respect.*".

40. In relation to 'chilling effect' arguments, the following paragraphs from the Upper Tribunal's decision in the case of *Davies v Information Commissioner and The Cabinet Office*[5] provide a useful summary of the relevant case law:

"*There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of public affairs are to be treated with some caution. In Department for Education and Skills v Information Commissioner and Evening Standard EA/2006/0006, the First-tier Tribunal commented at [75(vii)] as follows:*

> *"In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly-educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department's position, whether or not it is their own."*

*Although not binding on us, this is an observation of obvious common sense with which we agree. A three judge panel of the Upper Tribunal expressed a similar view in DEFRA v Information Commissioner and Badger Trust [2014] UKUT 526 (AC) at [75], when concluding that it was not satisfied that disclosure would inhibit important discussions at a senior level:*

> *"75. We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it...*
>
> *76. ...They and other organisations engage with, or must be assumed to have engaged with, public authorities in the full knowledge that Parliament has passed the FOIA and the Secretary of State has made the EIR. Participants in such boards cannot expect to be able to bend the rules."*

*In Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC), [2017] AACR 30 Charles J discussed the correct approach where a government department asserts that disclosure of information would have a "chilling" effect or be detrimental to the "safe space" within which policy formulation takes place, as to which he said:*

> *"27. ...The lack of a right guaranteeing non-disclosure of information ...means that that information is at risk of disclosure in the overall public interest ... As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that ... a person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed...*
>
> *28. ...any properly informed person will know that information held by a public authority*

[5] [2019] UKUT 185 (AAC) , paragraphs 25-30.

*is at risk of disclosure in the public interest.*

*29. ...In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way:*
*i) this weakness, ... is flawed."*

*Charles J discussed the correct approach to addressing the competing public interests in disclosure of information where section 35 of FOIA (information relating to formulation of government policy, etc) is engaged. Applying the decision in APPGER at [74] – [76] and [146] – [152], when assessing the competing public interests under FOIA the correct approach includes identifying the actual harm or prejudice which weighs against disclosure. This requires an appropriately detailed identification, proof, explanation and examination of the likely harm or prejudice.*

*Section 35 of FOIA, with which the Lewis case was concerned, does not contain the threshold provision of the qualified person's opinion, but these observations by Charles J are concerned with the approach to deciding whether disclosure is likely to have a chilling effect and we consider that they are also relevant to the approach to an assessment by the qualified person of a likely chilling effect under section 36(2) and so to the question whether that opinion is a reasonable one.*

*Charles J said at [69] that the First-tier Tribunal's decision should include matters such as identification of the relevant facts, and consideration of "the adequacy of the evidence base for the arguments founding expressions of opinion". He took into account (see [68]) that the assessment must have regard to the expertise of the relevant witnesses or authors of reports, much as the qualified person's opinion is to be afforded a measure of respect given their seniority and the fact that they will be well placed to make the judgment under section 36(2) – as to which see Malnick at [29]. In our judgment Charles J's approach in Lewis applies equally to an assessment of the reasonableness of the qualified person's opinion as long as it is recognised that a) the qualified person is particularly well placed to make the assessment in question, and b) under section 36 the tribunal's task is to decide whether that person's opinion is substantively reasonable rather than to decide for itself whether the asserted prejudice is likely to occur. Mr Lockley agreed that the considerations identified by Charles J were relevant. We acknowledge that the application of this guidance will depend on the particular factual context and the particular factual context of the Lewis case, but that does not detract from the value of the approach identified there."*.

<u>*Prejudice-based exemptions*</u>

41. The relevant exemption in section 36 of FOIA uses the terms 'would' and 'would be likely to' prejudice the effective conduct of public affairs. This means that the prejudice in question is more probable than not or that there is a real and significant risk of it happening.

42. The following statement from a First-tier Tribunal case was subsequently confirmed by the Court of Appeal in the case of *Department for Work and Pensions v Information Commissioner & Frank Zola*[6] as being the correct approach:

"*On the basis of these decisions there are two possible limbs on which a prejudice-based*

[6] [2016] EWCA Civ 758, paragraph 27 – see also Carolyne *Willow v Information Commissioner and Ministry of Justice* [2017] EWCA Civ 1876 at paragraph 27.

*exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.*".

43. Therefore if a public authority is to rely on any such section, it must show that there is some causative link between the potential disclosure of the relevant information and the prejudice to the effective conduct of public affairs.

44. The public authority must also show that the prejudice is real, actual or of substance. It must also relate to the interests protected by the exemption (namely, for the purposes of the appeal, the effective conduct of public affairs).

*The Public Interest Test*

45. The correct approach to the Public Interest Test was set out by the Upper Tribunal in the case of *All Party Parliamentary Extraordinary Rendition (APPGER) v The Information Commissioner and Foreign and Commonwealth Office*[7], cited with approval by the Court of Appeal in the case of *Department of Health v Information Commissioner & Simon Lewis*[8]:

"*when assessing competing public interests under the [2000 Act] the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote.*".

46. In the case of a prejudice-based exemption under FOIA, the fact that the exemption is engaged means that there is automatically some public interest in maintaining it, which this should be taken into account in the Public Interest Test. See, for example, the view of the Court of Appeal in the case of *Carolyne Willow v The Information Commissioner and Ministry of Justice*[9] (in the context of the prejudice-based exemption contained within section 31(1)(f) of FOIA).

47. Where the public interests in favour of disclosure and against disclosure are evenly balanced, then the information ought to be disclosed. As explained by the Court of Appeal in the *Department of Health* case[10]:

"*...when a qualified exemption is engaged, there is no presumption in favour of disclosure; and that the proper analysis is that, if, after assessing the competing public interests for and against disclosure having regard to the content of the specific information in issue, the decision maker concludes that the competing interests are evenly balanced, he or she will not have concluded that the public interest in maintaining the exemption (against disclosure) outweighs the public interest in disclosing the information (as section 2(2)(b) requires).*".

**The hearing and evidence**

48. The Tribunal read and took account of an open bundle of evidence and pleadings. The

[7] [2013] UKUT 0560 (AAC), paragraph 149
[8] [2017] EWCA Civ 374, paragraph 43.
[9] [2017] EWCA Civ 1876, paragraph 28
[10] [2017] EWCA Civ 374, paragraph 46.

Tribunal also read and took account of a closed bundle. The closed bundle contained the withheld material and additionally contained some unredacted material which had been redacted in the open bundle.

49. We also read and took account of a skeleton argument provided by the Appellant. We heard oral submissions from Carolyne Willows on behalf of the Appellant. As noted, the Commissioner did not attend the hearing and was not represented, having stated in his response to the appeal that he did not intend to attend the hearing.

***The Appellant's Submissions***

50. Whilst acknowledging all of the specific points made, the material submissions made by Carolyne Willow on behalf of the Appellant were as follows.

51. The opinion of the Minister was not reasonable for various reasons, having regard to the Commissioner's own guidance on factors relevant to the reasonableness of a qualified person's opinion, including:

    a. The Commissioner's guidance stated that if the prejudice envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable. There were two inter-linked arguments in the internal submission (namely that the Report was provided in confidence and that disclosure of it would be likely to damage trust and working relationship between the DfE and the Panel), therefore there was no clarity as to precisely how the prejudice to effective conduct of public affairs may arise.

    b. Certain elements of the minimum information which the Commissioner expected to see in connection with a reasonable opinion (as outlined in the form which the Commissioner produced in connection with that guidance to record the qualified person's reasonable opinion) was not present.

    c. There was no "internal scrutiny" of the reasons behind the Panel Chair's request for secrecy in respect of the Report. Without such detail, the qualified person could not possibly form a reasonable opinion.

    d. The risk of the Panel refusing to share findings in future was overstated in the internal submission and did not go beyond mere assertion. Moreover, it did not take into account the Panel's statutory and professional obligations which lean towards transparency and disclosure, nor the Panel's obligations in respect of the human rights of children.

52. In the Decision Notice, the Commissioner provided only one public interest argument in favour of disclosure, which focused on the internal decision-making and working arrangements of the Panel. Various factors put forward by the Appellant in the Complaint, relating to the public interest benefits for children, were not addressed by the Commissioner in the Decision Notice, including:

    a. the Appellant's belief that the Report would, if made public, help to raise awareness of the vulnerabilities of teenagers in care and strengthen the arrangements made by local authorities to protect them;

    b. the Appellant's arguments that (notwithstanding the DfE's position regarding

the confidential nature of the Report), statutory safeguarding guidance states that reviews may be shared with the DfE to enable it to carry out its functions - those functions include responsibility within government for child protection and the care system and learning from child deaths and serious harms suffered by children in care is vital.

53. In respect of the public interest arguments against disclosure in the Decision Notice, the Commissioner noted that release of the safeguarding report may lead to children being identified and disclosure of it could make sensitive and personal information available. However, the Commissioner did not reference or evaluate in the Decision Notice the Appellant's submissions about the importance of transparency in child protection, including with regard to how redactions are normally made and that redactions could equally be made in respect of the Report in order to maintain privacy of children and their families (whilst achieving transparency, which is vital for child protection).

**Discussion and conclusions**

*Outline of relevant issues*

54. The issues we needed to determine in the appeal were:

    a. whether section 36(2)(c) of FOIA (prejudice to effective conduct of public affairs) was engaged in respect of the requested information (namely, the Report); and

    b. if that section was engaged, whether (in all the circumstances), the public interest in maintaining the exemption outweighed the public interest in disclosing the Report.

55. We address each of those issues below, after two preliminary points.

*Timing of the DfE's response to the Request*

56. As we have noted, the DfE responded on 22 February 2022 to the Request (which was made on 6 December 2021). Subject to some limited exceptions, section 10 of FOIA requires a public authority to respond to a request for information promptly and in any event not later than the twentieth working day following the date of receipt of the request. No explanation was provided by the DfE as to why its response to the Request fell outside of those timescales and the Commissioner did not address this issue in the Decision Notice. Based on the evidence before us, we conclude that the DfE was in breach of section 10 because it did not respond to the Request within twenty working days of receipt of it.

*Evidential matters*

57. We refer below to certain submissions which were made by or on behalf of the Appellant in support of its appeal, relating to the matters such as the functions and duties of the Panel. We accepted those points as evidence, given the Appellant's status as a children's rights charity.

*Was the exemption in section 36(2)(c) of FOIA engaged?*

58. If any exemption in section 36 of FOIA is to apply then, pursuant to section 36(1)(a) of FOIA, the information in question must be held by a government department and must not be exempt information by virtue of section 35 of FOIA. It is evident (and not disputed) that relevant information was held by a government department (the Department for Education). Section 35 of FOIA was not relied on by the DfE nor raised by the Commissioner in the Decision Notice. Accordingly, the potential engagement of section 36 of FOIA is not precluded.

59. As we have noted:

    a. the Report is exempt from disclosure pursuant to the provisions of section 36(2)(c) of FOIA (subject to the Public Interest Test) if, in the reasonable opinion of a Minister of the Crown, disclosure of it would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs;

    b. the qualified person (Minister) in the current case was Will Quince;

    c. the 'reasonable opinion' of the Minister must be substantively reasonable (rather than procedurally reasonable), in accordance with the *Malnick* case.

60. The Minister's opinion was sought by way of an internal submission to him (dated 27 January 2022) which requested his opinion such that the Report could be withheld for the purposes of the exemption in section 36(2)(c) of FOIA. The submission included some comments regarding the alleged harm which could be caused by disclosure of the Report; in particular, that the Report was provided in strict confidence and therefore that disclosure would be likely to damage trust and the working relationship between the DfE and the Panel (including that it was likely that the Panel would be less willing to share information with the DfE).

61. The Ministerial Submission did not set out any arguments for and against disclosure for the purposes of the Public Interest Test, but stated that a Public Interest Test would be carried out if the Minister provided their opinion.

62. With regard to the Appellant's arguments we have outlined (in paragraph 51) as to the opinion of the Minister not being reasonable:

    a. We consider that the prejudice envisaged was related to the specific subsection in question, namely that the opinion was given specifically with regard to section 36(2)(c) of FOIA. We acknowledge that the Ministerial Submission included little detail by way of the alleged harm that would be caused by disclosure of the Report. However, we do not think it was unreasonable for the Minister to form an opinion that there may be prejudice to effective conduct of public affairs, having regard to the two 'inter-linked' arguments in the Ministerial Submission, on the basis that these could reasonably be said to have that effect. If an opinion is one that a reasonable person could hold then it is a reasonable opinion, even if someone else may have come to a different (also reasonable) conclusion. In this instance, we consider that the opinion was one which could reasonably be held.

    b. We agree that certain elements of the minimum information which the Commissioner might expect to see in connection with a reasonable opinion (as

referred to in the sample form provided by the Commissioner for recording the qualified person's opinion) was not present in the current case. However, as noted by the Appellant, there is no statutory requirement that a public authority use that form. Moreover, there is no statutory requirement for the opinion to take any particular form or to address any particular issues; rather (as noted above) the legal test is whether the opinion is one that a reasonable person could hold. The omission of certain elements, as referred to by the Appellant, does not necessarily mean that the opinion will not be a reasonable one. In the current instance, we find that these omissions were not material and do not render the opinion unreasonable.

c. For the same reasons as above, we consider that the qualified person could form a reasonable opinion even if there was no "internal scrutiny" of the reasons behind the Panel Chair's request for secrecy in respect of the Report.

d. Likewise, even if we were to accept that there were flaws in the Ministerial Submission as alleged by the Appellant (regarding the risk of the Panel refusing to share findings in the future), we consider that this would not render the Minister's opinion unreasonable.

63. We conclude that the Minister did provide an opinion which meets the requirements of the relevant provisions of section 36 of FOIA, including that the opinion was a reasonable one which could be held. We formed this view based on our assessment of the Ministerial Submission and our findings above, but we have also had regard to the observations of the Upper Tribunal in the *Malnick* case regarding the 'measure of respect' to be afforded to the qualified person's opinion (a point which was also accepted by the Appellant).

64. Accordingly, we find that section 36(2)(c) of FOIA was engaged in respect of the Report.

*Did the public interest in maintaining the exemption outweigh the public interest in disclosing the information?*

65. Having determined that section 36(2)(c) of FOIA was engaged, we now address whether the public interest in maintaining the exemption in that section outweighed the public interest in disclosing the information. We remind ourselves that this is to be assessed 'in all the circumstances of the case' as per section 2(2)(b) of FOIA.

66. As we have noted, in respect of the Public Interest Test, the Commissioner recognised in the Decision Notice that there was public interest in favour of disclosure of the Report (see paragraph 16). The main argument of the DfE in respect of maintaining the exemption was, fundamentally, a 'chilling effect' argument in the sense that the DfE's concerns were essentially about future behavioural changes of relevant stakeholders (in this case, the Panel and potentially local authorities) in response to the disclosure of the Report. The fundamental concern was that disclosure of the Report would be likely to damage trust and the working relationship between the DfE and the Panel, including that it was likely the Panel would be less willing to share information with the DfE in the future.

67. We accept that there is a risk of a 'chilling effect' and that this is a relevant factor in

assessing the Public Interest Test in this case. In reaching this view, we were assisted by the observations of Charles J in the *Department of Health case*[11] in relation to the approach to deciding whether disclosure is likely to have a chilling effect.

68. However, based on the evidence which was before us and taking into account the submissions of the parties (and considering all the circumstances of the case), we find that the public interest in disclosure of the Report outweighs the public interest in maintaining the exemption in section 36(2)(c) of FOIA. Our reasons are as follows.

69. First, we do not accept that disclosure of the Report would be likely to have the effect claimed (namely, that it would be likely to damage trust and the working relationship between the DfE and the Panel or be likely to result in the Panel being less willing to share information with the DfE in the future). This is based on the following reasons:

    a. There was no evidence that the Panel's working relationship with the DfE would be likely to be adversely affected. We acknowledge that there does not necessarily need to be specific evidence of the chilling effect in any given case[12]. However, in the facts of the present case it might reasonably be expected that the Panel would be contacted by the DfE regarding the Request and, if the Panel was indeed of the view that making disclosure of the Report would be likely to damage the working relationship with the DfE, then the DfE might request some written confirmation of that which the DfE could seek to rely on in support of its argument. There was no such written confirmation. However, this (of itself) is not a material point in any event, given the other issues we raise below.

    b. We do not consider that disclosure of the Report would, in respect of its content, adversely affect the relationship between the Panel and the DfE (or between local authorities and the DfE or the Panel). In our view, it does not contain any material which of itself would damage any such relationship. For example, it does not contain anything which would be embarrassing to the Panel or the DfE.

    c. Even if we were to accept that there was a chilling effect to some degree, such that the Panel might be 'less willing' to share information with the DfE in the future, that does necessarily mean that its sharing of information would be materially adversely affected. Further, as noted in the Appellant's arguments, the Panel has certain statutory obligations[13] regarding the provision of certain information in any event. We also agree with the Appellant's arguments to the effect that it is unlikely that the Panel would retreat from sharing relevant child protection information with the DfE in future, simply because of disclosure of the Report, especially given that the Panel's existence and purpose relates to the advancement of child protection.

    d. We are also mindful that the DfE, if it were required to disclose the Report, would

[11] Cited by the Upper Tribunal in the *Davies* case; see paragraph 39 above.
[12] See the comments of Mrs Justice Farbey CP (at paragraph 28) in the Upper Tribunal's decision in the *Department of Health and Social Care* case, citing *The Department of Work and Pensions v Information Commissioner, JS and TC* [2015] UKUT 0535 (AAC), paragraph 13.
[13] These points were made by the Appellant in the context of their arguments regarding the reasonableness of the qualified person's opinion. The Appellant referred to regulation 9 of The Child Safeguarding Practice Review and Relevant Agency (England) Regulations 2018, which relates to a duty of the Panel to provide to the Secretary of the State certain reports relating to national reviews relating to the safeguarding and welfare of children.

be doing so pursuant to a legal obligation. It is difficult to see how any relevant working relationships would be likely to be adversely affected simply by reason of the DfE complying with a legal duty. This would not be a case of the DfE acting in bad faith in respect of information that had been provided in confidence (which could understandably adversely affect a working relationship).

e. Related to the preceding point, we do not expect all civil servants to be 'highly educated' and 'politically sophisticated' (as referred to in the *Davies* case). However, we would expect at least a basic understanding by all civil servants of the fact that all information held by a public authority is potentially subject to disclosure in response to a freedom of information request.

f. We also accept the point made by the Appellant that disclosure of the Report would be consistent with the routine publication, by the DfE and others, of child protection reports.

70. We are doubtful regarding the point in the Decision Notice that disclosure of the Report may lead to individual children being identified by professionals, relatives or the press. There was no evidence before us to suggest how this might be the case and it was not apparent to us from the contents of the Report how anything might be linked to any identifiable individual, particularly by anyone other than professionals who might already know certain of the children concerned. However, even if that was the case then we consider that suitable redactions could be applied to the Report without materially detracting from the benefit that could be derived (in respect of the relevant public interest factors) from the disclosure of the remainder.

71. We also note the point made by the Commissioner that a summary of the Report was made publicly available and that this should be taken into account for the purposes of the Public Interest Test. We acknowledge that this could be a relevant factor for the purposes of the Public Interest Test (as part of the consideration of all of the circumstances). However, we are mindful that FOIA itself is centred around the actual disclosure of recorded information which is held by a public authority. More importantly, what was made publicly known was only a small summary of the relevant information held by the DfE and did not provide any meaningful information regarding the detail behind it. We therefore find that little (if any) weight should be afforded to this factor.

72. The point made by the Commissioner about a summary of the Report being publicly available could also be used to support arguments in favour of disclosure. We consider that this counteracts, to a degree, the arguments regarding the chilling effect. Further, if there is a summary of the Report in the public domain then this could be said to dilute the concerns about also making publicly available the information it is summarising.

73. We consider that there are also other public interest factors in favour of disclosure of the Report, including:

a. a need for transparency in child safeguarding, due to its protective function;

b. a need to promote and protect the human rights of children, especially children in care who are said to be among the most vulnerable in society;

c. a need for openness and transparency regarding the role of the DfE relating to child protection and relating to the safety and well-being of children in care;

d. the number of people in society (including children and their families) who are likely to have an interest in, or may benefit from, the information in the Report;

e. wider general public interest in the issues raised in the Report, including with regard to the experiences of children in care; and

f. the need for public scrutiny and potential challenge or debate regarding any relevant issues, including in the spirit of driving improvement to public services and child protection.

74. For completeness, we should note that we acknowledge and agree with the points made by the Commissioner regarding factors favouring maintaining the exemption in section 36(2)(c) of FOIA. However, we find that the factors outlined above in favour of disclosure outweigh them.

75. For the above reasons, we conclude that, taking into account all of the other factors we have outlined regarding the Public Interest Test, the resulting balance comes down in favour of disclosure of the relevant Report. We would note that, even if we had concluded that the scales were evenly balanced, then the outcome would be that the Report should be disclosed in any event (reflecting the position outlined in the *Department of Health* case we cited at paragraph 47). However, in our view this is not an evenly-balanced matter but rather there is a strong public interest in disclosure which outweighs the public interest in maintaining the exemption.

76. Accordingly, applying the Public Interest Test, we find that, in all the circumstances of the case, the public interest in maintaining the exemption in section 36(2)(c) of FOIA does not outweigh the public interest in disclosing the Report. Therefore the DfE cannot rely on that exemption to withhold the Report.

77. We also find that, given the points above, the Decision Notice did not take into account relevant factors for the purposes of the Public Interest Test (including some of the arguments made by the Appellant in favour of disclosure which were raised with the Commissioner in connection with the Complaint).

**Final conclusions**

78. For all of the reasons we have given, we conclude as follows.

79. We find that the Commissioner was correct in deciding, by way of the Decision Notice, that section 36(2)(c) of FOIA was engaged. However, we find that the Commissioner erred in the exercise of his discretion and/or the Decision Notice involved an error of law in concluding that the public interest favoured maintaining the exemption.

80. We therefore allow the appeal and we make the Substituted Decision Notice as set out above.

Signed: Stephen Roper Date: 11 September 2023
Judge of the First-tier Tribunal