Case Reference: EA-2023-0383

NCN: [2024] UKFTT 328 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: By CVP/telephone hybrid
Heard on: 12 April 2024
Decision given on: 24 April 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER DAVE SIVERS
TRIBUNAL MEMBER ANNE CHAFER

Between

ANDREW CHALLINOR

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: In person
For the Respondent: Did not attend

Decision: The appeal is allowed in part.

Substituted Decision Notice:

Organisation: Department for Culture, Media and Sport (DCMS)

Complainant: Mr Andrew Challinor

The Substitute Decision – IC-200585-L6W6

1. For the reasons set out below Department for Culture, Media and Sport (DCMS) was not entitled to rely on section 36(2) of the Freedom of Information Act to withhold the information requested in part 1 of the request dated 18 August 2022.

2. For the reasons set out below DCMS was entitled to rely on section 43(2) of the Freedom of Information Act to withhold the information requested in part 2 of the request dated 18 August 2022.

3. DCMS is ordered to take the following steps by no later than 42 days from the date this decision is sent to DCMS by the tribunal:

   (i) Disclose the information requested in part 1 of the request, redacted to remove any personal data which DCMS considers to be exempt under section 40(2) FOIA.

4. Any failure to abide by the terms of the tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-200585-L6W6 of 10 August 2023 which held that the Department for Culture, Media and Sport (DCMS) was entitled to rely on section 36(2) and 43(2) of the Freedom of Information Act 2000 (FOIA) to withhold the information. The Commissioner did not require DCMS to take any steps.

Factual background

2. DCMS provided the following background in their submission to the qualified person:

> "5. Football Index (provided by BetIndex Ltd) was a novel gambling product which operated under a licence from the Gambling Commission. The platform collapsed in March 2021, with the business having its licence suspended and going into administration. Customers claimed to have over £100 million in open bets with the company which they are unlikely to receive back.

6. In response to the collapse, the government commissioned regulatory expert Malcolm Sheehan KC to conduct an independent review into the regulation of the product to provide an objective account of what happened and lessons to be learnt. This was published in September 2021, and identified areas for improvement at both the Gambling Commission and Financial Conduct Authority.

7. However, there remains some dissatisfaction among former customers, and this FOI on the department's correspondence with Malcolm Sheehan is one of a series of FOIs which have been sent to DCMS, the Treasury, the Gambling Commission, and the Financial Conduct Authority. We believe these are in the hope of uncovering a basis for a renewed claim for government compensation of customers' losses."

3. We note that Mr Challinor disputes the assertion by DCMS that the review was 'independent'.

Requests, Decision Notice and appeal

The Request

4. Mr. Challinor made the following request to DCMS on 18 August 2022:

> "The information I am requesting is:
>
> (1) Correspondence to / from Malcolm Sheehan QC on the subject of Football Index.
>
> (2) The amount paid to Malcolm Sheehan QC for his work on the Football Index report."

DCMS' reply

5. DCMS replied on 12 October 2022 confirming that it held information within the scope of the request. It supplied some information redacted under section 40(2) (personal information) and 43(2) (commercial interests). It refused to supply the information requested in part 2 relying on section 43(2) (commercial interests). It refused to provide some information within the scope of part 1 relying on section 36(2)(c) (prejudice to the effective conduct of public affairs).

6. DCMS upheld its position on internal review on 3 November 2022.

The Decision Notice

7. In a decision notice dated 10 August 2023 the Commissioner decided that the GMCA was entitled to rely on section 36(2)(c) and 43(2) FOIA.

8. The Commissioner was satisfied that an opinion was provided by the qualified person, the then Parliamentary Under Secretary of State for Tech and the Digital Economy on 5 October 2022. Having considered the public authority's submissions and evidence, the Commissioner accepted that the exemption provided by section 36(2)(c) is engaged.

9. The Commissioner agreed with the public authority assessment of the public interest in this matter. That is releasing the withheld information would clearly detriment the process of public inquiries generally. Public inquiries need to be able to foster and maintain behaviours which encourage a free exchange of information. Exchanges which are not stymied or tailored by the belief that the exchanges may soon be placed in the public sphere. The Commissioner acknowledged the points made by the complainant but in this instance, he concluded that they did not carry the weight to favour the release of the information. Overall the Commissioner decided that the public interest favoured the maintaining of the exemption.

10. In relation to section 43(2) the Commissioner was satisfied that the harm the public authority envisaged related to the commercial interests of Mr. Sheehan QC. The Commissioner accepted that a causal link existed between disclosure and commercial prejudice i.e. that disclosing the amount paid might affect Mr. Sheehan QC in future commercial negotiations. If he were to take on a similar sized task in future, knowing the total figure paid would almost certainly give those that may instruct an upper hand in negotiations. The Commissioner considered that the envisioned prejudice would be likely to happen.

11. The Commissioner acknowledged the public interest in knowing a component part of the cost to the public purse of holding the inquiry. However the Commissioner noted that the costs of holding inquiries was generally well publicised. The Commissioner considered this to be a factor that addresses the public interest in transparency.

12. The Commissioner concluded that in this instance the public interest in releasing the withheld information was outweighed by the public interest in allowing a person to engage in commercial matters without their commercial position being undermined by the release of commercially sensitive information. Whilst that undermining decreases overtime the Commissioner concluded that, at the time of the refusal, the information was still potent information that would (if released) harm the commercial activity of a particular person. The Commissioner concluded that the balance of the public interest slightly favoured maintaining the exemption.

13. The Commissioner did not consider the application of section 40(2).

Notice of Appeal

14. Mr Challinor's grounds of appeal are, in summary:
    14.1. The Commissioner was wrong to conclude that section 36(2)(c) and section 43(2) were engaged.
    14.2. The Commissioner was wrong to conclude that the public interest favours withholding the information.

15. Mr Challinor submits that there is substantial public interest in the circumstances of Football Index due to:
    15.1. The significant size and extent of customers' losses;
    15.2. The Ponzi scheme style business model operated by Football Index; and
    15.3. The suspected gross failures in regulatory oversight by a number of government agencies (including, but not limited to, the Gambling Commission).

Section 36(2)(c)

16. Mr Challinor submits that disclosure builds public confidence in the independence and objectivity of the final report into the regulation of BetIndex, whereas secrecy damages public confidence in the independence and objectivity of the final report and hides the potential for public authorities to influence the outcome of third-party reports in their own interests and against the wider public interest.

17. Mr Challinor submits that the withheld information relates to information between the project sponsor (the DCMS) and the reviewer and therefore should be a low-level of sensitivity.

18. Mr Challinor argues that officials and third-party reviewers should have an expectation of a requirement for public transparency and be of a sufficiently resilient character to subject their communications to scrutiny.

Section 43(2)

19. Mr Challinor submits that disclosure of the amount paid regarding a historical project with the DCMS would provide no limiting factors to Mr Sheehan in future negotiations, because commercial negotiations about prospective work are likely to be based upon many factors.

20. Mr Challinor argues that there is a substantial public interest in transparency and accountability. Disclosure of the withheld information (fees) will act as a proxy for the intellectual effort expended into the review.

The ICO's response

21. The Commissioner relied on the Decision Notice.

Mr Challinor's reply

22. Mr Challinor submits that public confidence in "independent reviews" is based upon confidence that they are independent and is undermined if stakeholders can influence allegedly 'independent' reviews in their own interests, without scrutiny. Transparency is the critical foundation of independent reviews and requires protection. For this reason, in the public interest test, substantial weight must be applied to the protection of this transparency.

23. In relation to section 43(2) Mr Challinor submits that it is purely speculative that Malcolm Sheehan's commercial interests would be prejudiced by disclosure. He provides a differentiated service on highly bespoke projects, so no prejudice arises through the disclosure of the withheld information in this case.

24. Due to the seriousness of the circumstances surrounding the collapse of Football Index (the collapse left some former customers on the verge of suicide), Mr Challinor submits that there is a substantial public interest in disclosure of the extent (by disclosure of fees) of the independent review.

Submissions of Mr. Challinor dated 28 March and 4 April 2024

25. The submissions of 4 April 2024 were provided after DCMS provided a copy of the email said to contain the opinion of the qualified person. Mr Challinor submits that the evidence does not constitute a signed statement from the qualified person recording their opinion. Mr Challinor submits that there is no clear and unequivocal evidence that DCMS obtained the reasonable opinion of a qualified individual. The email dated 5 October 2022 from one undisclosed official to another undisclosed official within DCMS states that the Minister 'agrees with the recommendation in the submission'. The recommendation in the submission is a neutral statement inviting the qualified person to give their opinion.

26. Mr Challinor submits that it is not the role of the Information Commissioner, the Information Tribunal or his role to attempt to second guess what is meant by "agrees with the recommendation in the submission" but to take it at its face value.

27. In relation to part 1 of the request, Mr Challinor submits that the protection of public confidence in the independence (meaning free from bias) of independent reviews through the disclosure of the withheld information outweighs any concerns of prejudice claimed by the Information Commissioner.

28. In relation to part 2 Mr Challinor submits that there is no evidence to support the claim of commercial prejudice arising on disclosure. Mr Challinor's position that no commercial prejudice would arise is based on:

28.1. the product-market characteristics of the supply of highly bespoke in-person legal services (Mr Sheehan's business activity) not being a commodity and thus not an interchangeable comparable product and;

28.2. the circumstances prevalent at the time of any potential future pricing negotiations by Mr Sheehan (his order book, economic outlook, his work appetite, his overhead base etc.) would be different to those prevalent at the time of Mr Sheehan's pricing agreement with the DCMS.

29. Mr Challinor submits that the protection of public confidence in the thoroughness of independent reviews (the withheld information being a proxy for the intellectual effort expended into the independent review) outweighs any concerns of prejudice claimed by the Information Commissioner.

Evidence

30. We have before us and have read:
30.1. An open hearing bundle.
30.2. A closed hearing bundle.
30.3. The record of the qualified person's opinion dated 5 October 2022.
30.4. Additional submissions filed by Mr. Challinor.

31. The closed bundle consists of an unredacted version of the redacted information and the withheld information.

Legal framework

32. Section 36(2) provides, in so far as is material:

> 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:
> …
> (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.

33. A 'qualified person' for the purposes of this appeal is defined in section 36(5) as any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.

34. It is for the tribunal to assess whether the qualified person's (QP's) opinion that the listed prejudice would or would be likely to occur is reasonable, but that opinion ought to be afforded a measure of respect**: Information Commissioner v Malnick** [2018] UKUT 72 (AAC), [2018] AACR 29 at paragraphs 28-29 and 47.

35. The question for the tribunal is whether the opinion is substantively reasonable, and procedural reasonableness is irrelevant **(Malnick** at paragraph 56).

36. Section 43(2) provides:

> "Information is exempt information if its disclosure under this Act, would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it)"
>
> 'Commercial interests' should be interpreted broadly. The ICO Guidance states that a commercial interest relates to a person's ability to participate competitively in a commercial activity.

37. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

38. Section 36(2)(c) and section 43 are qualified exemptions, so that the public interest test has to be applied.

39. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect.

40. The APPGER case gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out:

> "… when assessing competing public interests under FOIA 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 of,

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."

The Task of the Tribunal

41. The tribunal's remit is governed by section 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

42. The issues we have to determine are as follows:

Part 1 of the request

1. Has a 'qualified person' given an opinion that section 36(2)(c) is engaged?
2. Was that opinion objectively reasonable?
3. If so, does the public interest favour maintaining the exemption?

Part 2 of the request

4. Would disclosure be likely to prejudice the commercial interests of any person?
5. Where does the balance of public interest lie?

Oral submissions by Mr Challinor

43. We heard oral submissions by Mr. Challinor in which he reiterated the points made in his written submissions.

Discussion and conclusions

44. In his written submissions Mr. Challinor has asserted that DCMS and other public bodes may have breached data privacy laws. This is not an issue before us, so we do not deal with this allegation.

45. Mr. Challinor questions whether DCMS have wrongly taken account of his motive in making the request. Mr. Challinor is correct that FOIA is applicant and motive blind However, as we carry out full merits review this issue is

subsumed in our consideration of the grounds of appeal and does not need to be explicitly addressed in our decision.

Section 36 (2)(c) - has a qualified person (QP) given an opinion that section 36(2)(c) is engaged?

46. The then Parliamentary Under Secretary of State for Tech and the Digital Economy is a qualified person under section 36(5).

47. The requirement under s 36(1)(2)(c) is for an opinion by the QP on whether or not the section is engaged. The QP is not required to give an opinion on whether or not the information should be withheld or whether the public interest favours disclosure.

48. The email from the QP dated 5 October 2022 states that the Minister 'agrees with the recommendation in the submission'.

49. It is unfortunate that we have not been provided with any document which clearly contains the opinion of the Qualified Person. If a public authority wishes to rely on the opinion of a Qualified Person, it should ensure that the opinion and the reasons for that opinion are clearly recorded. This is not because there is a requirement for the opinion to be given in a particular format, but because it is difficult for the tribunal to understand the QP's reasoning without such a document.

50. There is no requirement for the opinion to be given in a particular format, or to be signed by the QP. **Malnick** makes clear that it is not our role to consider the process by which the opinion is reached. As the Upper Tribunal highlighted in **Malnick** (at paragraphs 54 and 55):

    50.1. The decision-making process requirements should not be more demanding at the initial gateway stage than they are at the substantive stage of considering the public interest balancing test. All relevant interests are protected by the full merits determination required in applying the public interest balancing test. It makes little sense to have a more rigorous procedural test at the initial stage.

    50.2. Parliament has decided that the threshold question is a matter for the QP. If a procedural error prevents a public authority from relying on section 36, then (absent any other exemption applying) the disputed information must be disclosed, whatever the potential prejudice. By contrast, in a conventional judicial review scenario, the quashing of a public authority's decision for procedural error would have typically resulted in it being allowed to take the decision again.

51. As Mr. Challinor points out, the section entitled 'recommendation' in the submission to the QP is a neutral statement in that it asks for the QP's reasonable opinion rather than recommending a specific outcome:

> **"Recommendation**
>
> 4. You are invited to give your reasonable opinion as to whether releasing the correspondence at (Annex A) would, or would be likely to, prejudice the effective conduct of public affairs as per section 36(2)(c) of the Freedom of Information Act. Note, that we do plan to release the correspondence at Annex A.
>
> **Annexes**
>
> Annex A: Correspondence between DCMS and Malcolm Sheehan (proposed to withhold from release)"

52. Further we note that there is a contradiction between the last sentence of the recommendation ("Note, that we do plan to release the correspondence at Annex A") and the description of Annex A that follows ('proposed to withhold from release'). We presume this is due to a typographical error.

53. If the recommendation section is considered on its own and out of context, it is not clear from the statement that the Minister 'agrees with the recommendation in the submission' whether or not the QP holds the relevant opinion.

54. However, when looked at as a whole, the tenor of the submission is clear, particularly the paragraphs under the heading 'advice'. For example, paragraph 9, headed advice, states in bold:

> **"We consider that the information contained at Annex A should be withheld under section 36(2)(c) of the FOI Act, as releasing this information would, or would be likely to, prejudice the effective conduct of public affairs."**

55. When considering the qualified person's opinion, we take into account the fact that they are well-placed to make the assessment and are at a sufficient level of seniority to have been authorised as the qualified person under section 36(5)(o).

56. Given the terms of the submission to the QP, we are prepared to infer that the QP has agreed that section 36(2)(c) was engaged. We accept that he has, at least impliedly, given an opinion that section 36(2)(b)(c) is engaged, that it

was his opinion that disclosure would or would be likely to prejudice the effective conduct of public affairs.

Section 36 (2)(c) - was that opinion objectively reasonable?

57. We bear in mind that our role is restricted to considering whether the qualified person's opinion is reasonable rather than whether or not we agree with it.

58. We have proceeded on the basis that the reasons for reaching the opinion are those set out in paragraphs 9 and 11 of the Submission. We have also taken into account the fact that the QP had seen the withheld information. This appears to be the basis on which the QP concluded that disclosure of the information would be likely to prejudice the effective conduct of public affairs.

59. In the submission the prejudice to the effective conduct of public affairs is said to be that the release of the informal correspondence once the review had commenced would have a "chilling" effect on the government's relationship with key stakeholders, including the Gambling Commission, the Financial Conduct Authority, Malcolm Sheehan KC and potentially any future independent review chairs.

60. Although ostensibly in the section addressing the public interest the following part of the submission to the QP is also relevant to the question of prejudice:

> '…we consider release of the information… would have a negative impact on our relationship with key stakeholders now and in the future. Independent expert reviews are an important tool for government, and it is important that officials and experts can exchange information/evidence, comments on draft reports, and liaise about publication without fear of the information being released out of context… Departments should be able to exchange confidential information with appointed counsel without risk of disclosure.'

61. The tribunal's view, as set out below, it that there is unlikely to be any chilling effect as a result of our decision on future communications exchanging information/evidence, comments on draft reports and liaison about publication. Our reasons for this are set out below.

62. Further, for the reasons set out below, we consider that there would be likely to be very little prejudice to any 'safe space'.

63. However, we take into account that we must not substitute our own view for the QP's view, and we accept that a reasonable Minister could have reached

the opinion that disclosure would be likely to prejudice the effective conduct of public affairs.

Section 36 (2)(c) - public interest balance

64. Our primary focus when considering the public interest in maintaining the exemption is on the particular interest which the exemption is designed to protect, in this case avoiding prejudice to the effective conduct of public affairs.

65. In assessing the public interest balance, we have to reach our own view on whether the protected interests would or would be likely to be prejudiced and the severity, extent or frequency of such inhibition and prejudice. In doing so we give respect and weight to the opinion of the qualified person as an important piece of evidence.

66. According to the Upper Tribunal in **Malnick** [2018] UKUT 72 (AAC), at para 29, '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."

67. DCMS assert that release of the informal correspondence covered in the scope of the request would have a "chilling" effect on the government's relationship with key stakeholders, including the Gambling Commission, the Financial Conduct Authority, Malcolm Sheehan KC and potentially any future independent review chairs.

68. DCMS state:

> "…we consider release of the information within the correspondence would have a negative impact on our relationship with key stakeholders now and in the future. Independent expert reviews are an important tool for the government, and it is important that officials and experts can exchange information, evidence, comments on draft reports, and liaise about publication without fear of the information being released out of context. In this specific case, Malcolm Sheehan was appointed

through the Attorney General's Office process for procuring expert legal support for the government. Departments should be able to exchange confidential information with appointed counsel without risk of disclosure."

69. The tribunal finds that both the nature and context of the discussions and the identity of the parties to the correspondence increase the importance of the safe space.

70. We accept that there is a need for a safe space in relation to discussions taking place while independent expert reviews are being prepared. There is a need for time and space for officials and experts to exchange information, evidence, comments on draft reports, and liaise about publication. There is a need for a safe space for the exchange of information with external counsel who have been appointed as the chair of expert reviews.

71. In considering the likelihood of prejudice, we take account of the fact that these are informal communications which, to some extent, form part of an iterative process in producing a final report. Both those factors increase the importance of the safe space for this type of correspondence.

72. On the other hand, no submissions have been made as to any prejudice that would arise from any of the specific content of this information being released. In their submissions to the QP and to the Commissioner DCMS have not, for example, identified any emails or parts of emails that contain sensitive or controversial information or frankly expressed views or anything that might lead to sensationalist headlines or be misinterpreted by the media. DCMS state in their submission to the QP that 'much of the content… is relatively innocuous'.

73. We have reviewed the closed information and, in the absence of any specific content highlighted by DCMS, have not identified any information which we consider would be sensitive or controversial.

74. Overall, despite the lack of any identified specific content which might cause difficulties if released, we accept that there is a very clear need for a 'safe space' in relation to this type of communication while such a report is being drafted. However, we have also considered the timing of the request. We accept that the 'liveness' of a matter is not black and white. We accept that the public interest in maintaining a safe space waxes and wanes and does not evaporate the moment a report is published.

75. The relevant correspondence is dated between June and August 2021. The report by Malcolm Sheehan QC was published in September 2021. The request was responded to over a year later in October 2022.

76. In the section headed 'advice', the submission to the QP does not mention any ongoing work in this area or any specific harm or impact that disclosure of this specific information might have had on any ongoing related work.

77. In the 'background' section the submission does state that there remains 'some dissatisfaction' among former customers, and that this request is one of a series of FOIs which have been sent to DCMS, the Treasury, the Gambling Commission, and the Financial Conduct Authority. Those drafting the submission set out that DCMS believes 'these are in the hope of uncovering a basis for a renewed claim for government compensation of customers' losses.' The submission does not assert that the disclosure correspondence might cause any harm or impact on this.

78. In the circumstances, we find that the need for a safe space had reduced to a very significant extent by the time of the response to the request. At that date we do not think that there was any real or significant risk, from releasing the specific information in the withheld correspondence, of any impact upon any efforts to uncover a renewed compensation claim. We have not been made aware of ongoing work in this area and given the nature of the information in the withheld correspondence, we cannot see how disclosure would or would be likely to impact negatively on any ongoing work.

79. For those reasons, in our view the need for a safe space had all but evaporated by the time of the response to the request and that disclosure would not be likely to cause prejudice to the safe space.

80. We acknowledge the opinion of the QP, but its weight is limited given the lack of any reference to the specific content of the withheld information and the lack of any consideration on the impact of the timing of the request on the continuing need for a safe space.

81. DCMS make a broader point about prejudice to relationships with key stakeholders in the future, in relation to the ability to communicate in confidence in a 'safe space'. This is a 'chilling effect' argument.

82. It is the tribunal's view that a degree of circumspection about reliance on a 'chilling effect' is justified where there is simply an assertion that that is what will occur.

83. This does not mean that the threshold can never be discharged (particularly given the low degree of likelihood required), nor that it cannot properly be discharged on the basis of evidence setting out the basis of the view that such a chilling effect will occur (see para 138 **DfT v ICO and Alexander** [2021] UKUT 327 (AAC)).

84. Neither the submission to the QP nor the submission to the Commissioner explain why a decision by this tribunal, on these particular facts, to the effect that the public interest favours disclosure, would be likely to lead to a change in behaviour.

85. There always was and remains a 'risk' of disclosure under FOIA. Those at DCMS, the Gambling Commissioner, the Financial Conduct Authority and those individuals senior enough to chair independent reviews will be or ought to be aware of that. Those individuals should not be acting 'without fear of the information being released'. There is no absolute exemption for information of this nature. Despite the lack of a guarantee of confidentiality the tribunal would expect those individuals to act properly and in accordance with their duties in discussing, contributing to, commenting on or preparing such reports.

86. Any future effects said to flow from the fact that individuals are aware that there is a risk of disclosure or are not able to act without fear of disclosure do not follow from our decision. Our decision does not make any future correspondence of this nature more likely to be released. We conclude that no generalised chilling effect would be likely to arise from the decision in this appeal. If there is any generalised chilling effect it comes from the passing of FOIA, and we rely on the courage and independence of those concerned to be robust in the face of the extant risk of publicity to which our decision adds nothing.

87. In our view there is little or no additional risk that the individuals concerned would be deterred from fulfilling their public duties because of a risk of publicity that they might perceive flowed from our decision to disclose.

88. Whilst we take account of the expertise and experience of the QP, we are not persuaded that there is anything in the submission that addresses the issues we have identified above in relation to assertions of a generalised chilling effect.

89. Overall, our conclusions are that there is a low risk of prejudice to the effective conduct of public affairs as a result of disclosure of the requested information. This carries little weight in the public interest balance and accordingly we find that there is limited public interest in maintaining the exemption.

90. In terms of the public interest in disclosure, we accept that there is a general public interest in transparency in relation to the preparation of an independent expert report. This is increased to some extent because of the number of individuals who have lost significant amounts of money. Further there is a public interest in disclosing the correspondence because it would

serve to reassure the public of the independence of Malcolm Sheehan QC and that DCMS and Malcolm Sheehan QC conducted themselves appropriately.

91. Weighing up the public interest balance we conclude that in these circumstances the public interest favours disclosure.

92. For those reasons we conclude that the public authority was not entitled to rely on section 36(2)(c) to withhold the information requested in part 1 of the request and the appeal is allowed to that extent.

93. Mr Challinor has not challenged the redactions made under section 40(2).

Section 43(2) – would disclosure be likely to prejudice the commercial interests of any person?

94. The requested information is 'the amount paid to Malcolm Sheehan QC for his work on the Football Index report'. We accept that knowing the amount that Mr. Sheehan was paid is likely to give his competitors an insight into the level of fees that he charges for work of this nature. We accept that there is likely to be a fairly small pool of barristers who undertake similar work, but we take judicial notice of the fact that it is not just Mr. Sheehan who conducts such reviews. This insight into Mr. Sheehan's fees is likely to give other barristers some advantage when negotiating fees for similar work.

95. Further, we accept that Mr. Sheehan is likely to have to negotiate fees for broadly similar work in the future, and if the other party knew what he had charged on this occasion, it would give them some insight into the amount he usually charges and is likely to give them some advantage when negotiating fees.

96. We note Mr. Challinor's submissions on the bespoke service provided by Mr. Sheehan, and on the age and specific circumstances of this particular fee. However, whilst this reduces the usefulness of the information to others we find that it would still be of some assistance in the way set out above.

97. On this basis we accept that there is a causative link between disclosure and a real and significant risk of prejudice to Mr. Sheehan's commercial interests.

Section 43(2) – public interest balance

98. In terms of the public interest in maintaining the exemption we have found that the information is likely to be of some assistance to others when negotiating fees either with Mr. Sheehan or in competition with Mr. Sheehan. There is a public interest in not distorting competition and this leads to a moderate public interest in maintaining the exemption.

99. In terms of the public interest in disclosure, we accept that there is a general public interest in knowing the amounts of public money spent by public authorities and a general public interest in knowing the amount of public money spent on a report of this nature. Given that Mr. Sheehan was not the only external lawyer working on the report, then revealing the amount paid to him would not serve this latter public interest. In our view there is only a limited public interest in knowing the specific fee paid to one of the barristers working on the report.

100. We do not accept that the amount paid to Malcolm Sheehan QC is a 'proxy for the intellectual effort' expended on the review. Without knowing Mr. Sheehan's hourly rate it is not possible to ascertain how many hours be spent on the report. In any event, the request is for Mr. Sheehan's fees, not for the overall expenditure on Counsels' fees and therefore the fees do not give any indication on how much work overall went into the review.

101. Overall, in our view there is a limited public interest in disclosure which is outweighed by the fairly moderate public interest in maintaining the exemption.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 23 April 2024