Neutral citation number: [2025] UKFTT 202 (GRC)

Case Reference: FT/EA/2023/0452

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard by Cloud Video Platform
Heard on: 27 January 2025
Decision given on: 14 February 2025

Before

TRIBUNAL JUDGE MORNINGTON
TRIBUNAL MEMBER COSGRAVE
TRIBUNAL MEMBER PALMER-DUNK

Between

THE CABINET OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Mr Ewan West, King's Counsel
For the Respondent: Mr Remi Reichold, Counsel

Decision: The appeal is dismissed.

REASONS

Context

1. The context of this appeal is important in this case in that it forms the backdrop of this appeal and adds context to the Tribunal's decision.

2. On 29 January 2023, Mr Nadhim Zahawi was removed from public office in his role as Chancellor of the Exchequer. This removal was the outcome decided upon by the then Prime Minister, Mr Rishi Sunak, following an investigation into alleged serious breaches of the Ministerial code by Mr Nadim Zahawi which was undertaken by the Prime Minister's Adviser on Ministers' Interests, Sir Laurie Magnus.

3. Following Sir Magnus' investigation, he sent a letter to the then Prime Minister setting out the scope of his investigation, his findings that Mr Zahawi was indeed in serious breach of the Ministerial code and his opinion that "Mr Zahawi's conduct as a Minister has fallen below the high standards that, as Prime Minister, you rightly expect from those who serve in your government".

4. The matter attracted significant media and public interest and for this reason, the letter of Sir Magnus to the Prime Minister was published online on the government website (along with Mr Sunak's letter to Mr Zahawi and Mr Zahawi's response letter to Mr Sunak.)

5. Sir Magnus' letter made reference to the Ministerial declaration of interest form which is completed by all Ministers upon their appointment and, in Mr Magnus' opinion ought to be continuously updated. Sir Magnus set out that this form was part of the *"extensive and rigorous framework designed to provide clear guidance on how interests are declared and handled"*.

6. Sir Magnus' letter to the Prime Minister went on to state: *I consider that by failing to declare HMRC's ongoing investigation before July 2022 - despite the ministerial declaration of interests form including specific prompts on tax affairs and HMRC investigations and disputes - Mr Zahawi failed to meet the requirement (at paragraph 7.3 of the Ministerial Code) to declare any interests which might be thought to give rise to a conflict.*

7. It is the Ministerial declaration of interests form referred to in this letter which forms the basis of this appeal.

Background to Appeal

8. This Appeal dated 20 October 2023 and made by the Cabinet Office (the "Appellant") arises following a request for information (the "Request") made by the Mr Philip Kemp ("the Requestor") to the Appellant on 31 January 2023 in the following terms:

'In Sir Laurie Magnus's letter to the prime minister regarding his investigation into Nadhim Zahawi's tax affairs, he writes:

"I consider by failing to declare HMRC's ongoing investigation before July 2022 – despite the ministerial declaration of interests form including specific prompts on tax affairs and HMRC investigations and disputes – Mr Zahawi failed to meet the requirement to declare any interests which might be thought to give rise to a conflict."

Under the Freedom of Information Act I would like to request the following:

- A blank copy of the version of ministerial declaration of interests form to which Sir Laurie Magnus is referring, as would have applied in July 2022
- A copy of any accompanying guidance containing prompts on tax affairs, HMRC investigations and disputes
- A blank copy of the most recent version of ministerial declaration of interests form available to ministers being appointed as of 31 January 2023

If this information is already available publicly and I have missed it, please could you direct me to it.'

9. The Cabinet Office responded to the request on 29 March 2023 and confirmed that whilst the requested information was held, the Cabinet Office considered the information to be exempt from disclosure pursuant to s36(2)(b)(i) and s36(2)(c) of the Freedom of Information Act 2000 ('FOIA'). However, the Cabinet Office did provide the Requestor with a published List of Ministers' Interests and an accompanying guide to the categories of interest to be disclosed on the form.

10. On the same day, 29 March 2023, the Requestor advised the Cabinet Office that he was dissatisfied with their response and requested an internal review of their decision.

11. On 21 April 2023, having conducted its internal review, the Cabinet Office responded to the Requestor to confirm that its decision was upheld and that the exemptions referred to above were applicable.

Reasons for Commissioner's Decision

12. The matter was referred to the Information Commissioner's Office by the Requestor on 24 April 202 and, in a decision notice (the "Decision Notice") dated 22 September 2023, the Information Commissioner ("IC") held that:

"The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of sections 36(2)(b)(i) and (c) but that the public interest in disclosing the information outweighs the public interest in maintaining the exemptions.

The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation:

- *Provide the complainant with a copy of the two versions of the forms it holds falling within the scope of the request".*

13. The Commissioner accepted that the exemptions under s36(2)(b)(i) and (c) were engaged and that generally the opinion of the Qualified Person ('QP') (sought by the Appellant during the FOIA request process) was a reasonable one.

14. In summary, the Commissioner's reasons for the Decision were that although it was accepted by the IC that, as per the QP's opinion, it is plausible that disclosure of the blank forms could lead to revisions of it in future, having considered the evidence, the IC was not persuaded that a future iteration of the form would be less helpful to Ministers. Moreover, it was accepted by the IC, as per the QP's opinion, that disclosure poses some risk to the confidentiality of the process which would potentially impact the effectiveness of the process. However, the IC was not convinced that the level of risk was high enough to outweigh the public interest in disclosure.

15. The IC considered that the QP opinions of prejudices arising from pressure on the Independent Adviser, Ministers Interest or Ministers, the erosion of Minister's privacy and future potentially vexatious requests were not reasonable.

16. The IC considered that any impact on the Cabinet Office as a result of the disclosure would be relatively limited and short term. The IC considered that the information requested in the blank forms is not markedly different to information already in the public domain about declarations to be made by Ministers. The IC decided that minimal weight should be given to the public interest argument in maintaining the exemption.

17. It was the IC's view that there is a strong public interest in ensuring that the process regarding the declaration of Ministers' interests is transparent and that the disclosure of the forms would contribute to this transparency and could improve public confidence in the process, particularly in light of the Nadhim Zahawi controversy at the time of the request.

Appeal and Responses

18. The appeal relates to the application of the Freedom of Information Act 2000.

19. The Appellant appealed the IC Decision Notice on the following grounds:

(a) failure by the IC to find that the balance of public interest favoured maintaining the exemption in section 36(2)(b)(i) FOIA ('Ground One') in that:

(i) Disclosure may lead to speculative scrutiny regarding why certain elements are included in the forms, potentially leading to amendments to the form which undermines its effectiveness.

(ii) The Commissioner overestimated the public interest in disclosure, especially relating to recent political controversies.

(iii) Disclosure could diminish Ministers' confidence in the confidentiality of the declaration of interests process.

(b) failure by the IC to find that the balance of public interest favoured maintaining the exemption in section 36(2)(c) FOIA ('Ground Two') in that:

(i) Disclosure could lead to a loss of confidence among Ministers, affecting the efficiency of the Ministerial interests declaration process.

(ii) The Commissioner underestimated the potential need for additional mitigations and assurances that would become necessary if the withheld Information were disclosed.

(iii) The Commissioner failed to appropriately weigh the potential negative impacts on governmental operations against the public interest in transparency.

(iv) Managing the fallout from disclosure would strain government resources. This includes the time and effort needed to handle increased FOI requests and manage public or media inquiries, especially if disclosure leads to heightened scrutiny or speculative interpretations of the forms. In the Appellant's view, spending this extra resource is not in the public interest.

20. In summary, the Commissioner's response to the appeal maintains that the Decision Notice is correct in law and that in all the circumstances, the balance of public interest did not favour maintaining the exemptions in s36(2)(b)(i) FOIA and s36(2(c) FOIA.

21. In response to Ground One the IC stated that:

(a) The blank forms are similar to publicly available information and that their disclosure enhances transparency in Ministerial interests without significant risk.

(b) understanding the forms improves public confidence in the process and that recent public interest in Ministerial transparency justifies disclosure.

22. In response to Ground Two the IC stated that:

(a) It is not accepted that disclosure would severely affect the efficiency or confidentiality of the Ministerial interests process. The IC emphasised that the information in question consists solely of blank forms, which do not contain sensitive personal data or confidential Ministerial disclosures. The forms themselves are standardised documents designed to elicit information from Ministers, and their format does not differ significantly from details already available in the public domain. As such, the Commissioner reasoned that releasing the requested forms would not compromise any confidential information or reveal sensitive internal processes.

(b) As the requested forms are blank, senior officials would not be inhibited by FOIA disclosures. The Commissioner reasoned that senior officials involved in the process are experienced and well-versed in FOIA requirements, making it unlikely that the prospect of disclosure would meaningfully inhibit their candour or diligence.

(c) the Appellant failed to provide specific instances or credible scenarios demonstrating how the release of blank forms would materially impact the integrity or effectiveness of the Ministerial interests process. Additionally, the arguments from the Qualified Person ('QP') relied heavily on broad assertions about potential risks without adequately addressing the actual content of the disputed forms, which are blank and contained, in the IC's view, information largely consistent with publicly available material.

23. Accordingly, the Commissioner maintained that the potential for harm was minimal and theoretical, and therefore insufficient to outweigh the public interest in transparency and accountability.

Evidence

24. By way of evidence and submissions the tribunal has had the following, all of which has been taken into account when making this decision:

(a) An agreed 190-page bundle of open documents.

(b) A closed bundle of documents containing the withheld information, a witness statement from Mr Simon Madden, Director of Propriety and Ethics at the Cabinet Office and submissions of the Qualified Person.

(c) Skeleton arguments from Mr Ewan West KC (acting on behalf of the Appellant) and Mr Remi Reichold (acting on behalf of the Respondent)

(d) Oral evidence of Mr Simon Madden, Director of Propriety and Ethics at the Cabinet Office

(e) Oral submissions made by Mr Ewan West KC on behalf of the Appellant and Mr Remi Reichold on behalf of the Respondent.

Applicable Law

25. The relevant provisions of FOIA are as follows:

1 General right of access to information held by public authorities.

(1) Any 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.

36 Prejudice to the effective conduct of public affairs

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

(a).....

(b) would, or would be likely to inhibit--

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

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

26. Section 36(2) is subject to a public interest test, which is found at section 2, namely:

2(2) (a) ….

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

58 Determination of appeals.

(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

27. The Tribunal was referred to a number of authorities, key aspects of some follow below. Whilst the Tribunal is conscious that it is not bound by other decisions of the First-tier Tribunal and its predecessor Tribunals, where such decisions are referred to, the Tribunal is satisfied that it is appropriate to follow the same approach as those previous decisions.

28. It should not be concluded that should an extract from a previous decision not be detailed below that the authorities the Tribunal were referred to have not been considered in full by the Tribunal. This is not the case. The Tribunal has taken account and carefully considered all of the authorities to which it was directed by the parties both in oral submissions and by way of an authorities bundle.

29. The Upper Tribunal set out a number of principles to be followed in Section 36 cases in *IC v Malnick* [2018] AACR 29:

at paragraph 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.

at paragraph 31:

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

at paragraph 32:

The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed.

at paragraph 33:

Given the clear structural separation of the two stages, it would be an error for a tribunal to consider matters of public interest at the threshold stage.

At paragraphs 64-65:

64. We recognise, of course, that the F-tT's decision must be read as a whole. However, that said, neither in paragraphs 46 and 47, nor in any other passage in the reasons, is there any hint by the tribunal that it was proceeding on the premise that the QP's opinion was reasonable. Yet that was an essential step in its analysis if it was to proceed properly on the alternative basis that section 36 was indeed engaged. Alternatively, the view expressed at paragraph 46 by reference to paragraphs 42 and 43 show that, if any weight was afforded to the QP opinion, it was very slight on account of the view that the F-tT had taken of the merits of that opinion: a view which, as we have found, was itself flawed.

65. Thus the consideration of the public interest balancing test was flawed by the F-tT either ascribing no weight at all to the QP's opinion or, if it did, failing to give it appropriate weight given the errors identified under Ground 1 above.

1. At paragraph 45, the Upper Tribunal adopted the following passages from *Guardian Newspapers Ltd and Heather Brooke v Information Commissioner and British Broadcasting Corporation* (EA/2006/0011 and EA/2006/0013):

> *"14. In light of this material we consider the following observations are justified concerning the nature of the tribunal's appellate jurisdiction:*
>
> > *(1) The tribunal's task is not a judicial review of the Commissioner's decision on the principles that would be followed by the Administrative Court in carrying out a judicial review of a decision by a public authority (contrast the jurisdiction relating to national security certificates under section 60(3), which is expressly on a judicial review basis). The statutory jurisdiction under section 58 is substantially wider.*
> >
> > *(2) The tribunal does not start with a blank sheet. The starting point is the Commissioner's notice. But analogy with the Court of Appeal is not apt. The Court of Appeal only hears fresh evidence in special circumstances. By contrast, subject to limited exceptions, the tribunal is required to receive relevant evidence, documents and information from the parties to the appeal, and the material is not limited to that which was available to the Commissioner.*
> >
> > *(3) In considering whether the Commissioner's notice is in accordance with the law, the tribunal must consider whether (in the present context) the provisions of FOIA have been correctly applied. The tribunal is not bound by the Commissioner's views or findings but will arrive at its own view.*

In doing so it will give such weight to the Commissioner's views and findings as it thinks fit in the particular circumstances.

(4) In some cases the correct application of the provisions of the Act will depend upon the findings of fact. Where facts are in dispute, the tribunal may review any finding of fact by the Commissioner. The tribunal will reach its conclusions on the factual issues upon the whole of the material which is properly before it on the appeal. Having decided the factual issues, the tribunal must consider the correct application of the provisions of the Act to the facts as found. It is therefore possible that in some cases the tribunal will consider that the Commissioner's notice is not in accordance with the law, not because of any error of legal reasoning in the notice, but because the tribunal, having received evidence at the appeal hearing, makes findings of fact which are different from those made by the Commissioner.

(5) In some cases the dispute on appeal will be on the public interest test in s2(2)(b), namely, whether the public interest in maintaining a qualified exemption outweighs the public interest in disclosing the information. Adjudging the balance of public interest involves a question of mixed law and fact, not the exercise of discretion by the Commissioner. If, based either on the Commissioner's original findings of fact or on findings made by the tribunal on fresh evidence, the tribunal comes to a different conclusion from the Commissioner concerning the balance of public interest, that will involve a finding that the Commissioner's notice was not in accordance with the law and should be corrected.

(6) The combination of the power to review findings of fact and the duty under the rules to receive evidence on the appeal does not predetermine the extent of the tribunal's review of the facts. This will depend upon the circumstances of the case. If in a particular case no fresh evidence is adduced, or the tribunal considers that the fresh evidence is not of material significance, the tribunal will proceed on the basis of the facts found by the Commissioner.

(7) While it is not necessary for the purposes of the present case to consider the situation where the notice involved an exercise of discretion by the Commissioner, we incline to the view that in such a case the tribunal must form its own view on how the discretion ought to have been exercised. Review of the merits of the Commissioner's exercise of discretion is assisted by the presence of lay members on the tribunal. Again, the tribunal's decision may be affected by findings of fact which differ from those made by the Commissioner."

30. The Upper Tribunal further endorsed paragraph 54 of *Guardian Newspapers and Brooke:*

> 54. *The first condition for the application of the exemption is not the Commissioner's or the Tribunal's opinion on the likelihood of inhibition, but the qualified person's "reasonable opinion". If the opinion is reasonable, the Commissioner should not under section 36 substitute his own view for that of the qualified person. Nor should the Tribunal.*

and where at paragraph 60 *Guardian Newspapers and Brooke* held that:

> *the substance of the opinion must be objectively reasonable*

and

> *there may (depending on the particular facts) be room for conflicting opinions, both of which are reasonable.*

31. A number of principles were set out by the Information Tribunal in *Hogan and Oxford City Council v Information Commissioner* EA/2005/0026 and 30*:*

> *28. The application of the 'prejudice' test should be considered as involving a number of steps.*
>
> *29. First, there is a need to identify the applicable interest(s) within the relevant exemption. …*
>
> *30. Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance (Hansard HL, Vol. 162, April 20, 2000, col. 827)."…*
>
> *31. When considering the existence of 'prejudice', the public authority needs to consider the issue from the perspective that the disclosure is being effectively made to the general public as a whole, rather than simply the individual applicant.*
>
> *…*
>
> *34. A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in John Connor Press Associates Limited v Information Commissioner (EA/2005/0005) interpreted the phrase "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. …*

35. On the basis of these decisions there are two possible limbs on which a prejudice-based 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. We consider that the difference between these two limbs may be relevant in considering the balance between competing public interests (considered later in this decision). In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question.

2. These passages received the approval of the Court of Appeal in *Dept for Work & Pensions v Information Comr* [2017] 1WLR 1 [at paragraph 27In the same decision, the Court of Appeal further confirmed that:

3. In APPGER v ICO [2011] UKUT 153 (AAC), the Upper Tribunal held that (at paragraph 75):

In our view correctly, it was accepted before us by the FCO and the IC that when assessing competing public interests under section 27 of 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.

and at paragraph 76

Such an approach 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 material in respect of which the section 27 exemption is claimed would (or would be likely to or may) cause or promote.

4. In APPGER v ICO [2013] UKUT 0560 (AAC) the Upper Tribunal gave guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be undertaken:

75. […] 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 […]

76. Such an approach 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 material in respect of which the […] exemption is claimed would (or would be likely to or may) cause or promote. Plainly that includes an identification of the relevant material and the circumstances in which it was provided to or obtained by the body claiming the […] exemption."

32. The Tribunal is satisfied that this approach is also appropriate when considering a Section 36 exemption.

33. On the public interest balancing test, the Upper Tribunal in *O'Hanlon v Information Commissioner* [2019] UKUT 34 (AAC) [15] identifies the task for the Tribunal:

The first step is to identify the values, policies and so on that give the public interests their significance. The second step is to decide which public interest is the more significant. In some cases, it may involve a judgment between the competing interests. In other cases, the circumstances of the case may (a) reduce or eliminate the value or policy in one of the interests or (b) enhance that value or policy in the other. The third step is for the tribunal to set out its analysis and explain why it struck the balance as it did.

5. *Hogan* also considers the public interest test [at paragraph 55]:

The application of the public interest test involves a question of mixed law and fact, not the exercise of any discretion by the IC.

and at paragraph 56

FOIA does not include any general provision that there is a presumption in favour of the disclosure of information held by public authorities. However in one important respect FOIA does contain a presumption in favour of disclosure. The duty to communicate under s.1(1)(a) is displaced by a qualified exemption under s.2(2)(b) only if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information sought. So if the competing interests are equally balanced, then the public authority, in our view, must communicate the information sought.

and at paragraph 57

The question to be asked is not; is the balance of public interest in favour of maintaining the exemption in relation to this type of information? The question to be asked is; is the balance of public interest in favour of maintaining the exemption in relation to this information, and in the circumstances of this case?

and at paragraph 58

The passage of time will also have an important bearing on the balancing exercise. As a general rule, the public interest in preventing disclosure diminishes over time.

6. In *England v Information Commissioner* 2007 WL 9362177 [at paragraph 62], the Information Tribunal held that given that it is inevitable that there is no evidence of exactly what would happen on disclosure:

it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely.

The Information Tribunal went on to hold (at paragraph 65):

(a) The default setting in the Act is in favour of disclosure. Information held by public authorities must be disclosed on request, unless the Act permits it to be withheld.

(b) If the public interest in favour of maintaining the exemption is equally balanced against the public interest in disclosure, then the exemption will not exclude the duty to disclose.

(c) There is no express provision that requires a Public Authority to apply a presumption in favour of disclosure when considering exemptions to the general duty to disclose, which is in contrast to the Environmental Information Regulations 2004.

(d) There is an assumption built into FOIA that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities. The strength of that interest and the strength of competing interests must be assessed on a case-by-case basis and not least because section 2(2)(b) requires the balance to be considered "in all the circumstances of the case".

(e) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining an exemption diminishes over time.

(f) In considering public interest factors in favour of maintaining the exemption, they relate to the particular interest which the exemption is protecting. In this case the prevention of crime.

(g) The public interest factors in favour of disclosure are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process.

and at paragraph 86:

The exercise of considering the competing public interests depends not upon the length of the list of the different sorts of public interests on one side or the other but upon how important each of the factors is.

7. A number of these principles were endorsed by the Upper Tribunal in *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC)

38. In my view, there is no presumption in favour of disclosure included in FOIA (contrast Regulation 12(2) of the Environmental Information Regulations). The point that FOIA gives a right to information subject to exemptions does not mean that once a qualified exemption is engaged there is a presumption or bias in favour of disclosure founded on the general underlying purposes of FOIA. Rather, the position is that if, after a contents based assessment of the competing public interests for and against disclosure has been carried out, 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 (i.e. against disclosure) outweighs the public interest in disclosing the information (as s. 2(2)(b) requires).

34. In *Montague v Information Commissioner ('IC') and the Department of International Trade ('DiT') [2022] UKUT 104 (AAC*) when considering the balance of competing public interests, the Upper Tribunal concluded:

86...The public authority is not to be judged on the balance of the competing public interests on how matters stand other than at the time of the decision on the request which it is has been obliged by Part I of FOIA to make. [para. 86]

87. We therefore conclude that the FTT erred in law in its decision (…) in not confining itself to assessing the balance of the competing public interests for and against disclosure on the basis of matters as they were at the date of DIT's (initial) refusal decision.

35. In R (Evans) v Attorney General [2015] AC 1787 it was held that the Tribunal has to *"assess the correctness of the public authority's refusal to disclose as at the date of that refusal"*

36. The weight to be attached to the Qualified Person's opinion was dealt with in *DWP v IC & Zola [2016] EWCA Civ 758,* at paragraph 55:

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.

Evidence and Submissions

The Appellant's position

37. The Cabinet Office contends that the Information Commissioner erred in balancing public interest factors. They argue that the risks to governmental processes and Ministerial candour outweigh the benefits of disclosure. The appeal seeks to reverse the DN, thereby maintaining the confidentiality of the requested information.

38. In support, the Appellant relies on the evidence of Mr Simon Madden, Director of Propriety and Ethics at the Cabinet Office since August 2022. The Appellant claims that the evidence of Mr Madden is expert, credible, and directly relevant, given his role and knowledge in managing and operating the very systems under scrutiny in this appeal.

39. Mr Madden provides that the system for Minister's declaring interests relies heavily on the trust and candour of Ministers, who "thus *may be reluctant to provide the same level of detail*" that they do currently.

40. Mr Madden acknowledges the public interest in government transparency and the importance of public confidence in how Ministers' interests are managed. He states

that this is a "relatively balanced judgment," suggesting that while transparency is important, it must be weighed against potential harms.

41. He argues that there are already sufficient mechanisms in place to ensure transparency without the need for additional disclosures which include:

    (a) Published Lists of Ministers' Interests, which are to be updated regularly. Mr Madden accepts that the list does not contain all of the interests declared by Ministers, only those relevant to their portfolio as determined by the Independent Advisor.

    (b) The Guide to the Categories of Interest accompanying the above-mentioned List.

    (c) Overseeing of the process by the Independent Adviser on Ministers' Interests, Sir Laurie Magnus.

    (d) Existing FOIA provisions for information requests in less sensitive contexts.

42. In his evidence, Mr Madden addresses specific harm which is likely to arise upon disclosure of the withheld information to include:

    (a) *Speculative Public Scrutiny:* Mr Madden claims that disclosing blank forms could lead to public speculation about why certain categories or prompts are included, why the form is set out in a certain way, why the order of the questions have been set out in the way they have (does this mean some topics take priority over others?). This speculation, in Mr Madden's view, is likely to induce pressure to modify future versions of the form to avoid misinterpretation. This modification, in turn, could result in future versions of the form being less detailed or effective, as Officials may avoid including prompts that could trigger public controversy. Mr Madden suggested in oral submissions that due to public scrutiny, the process may become less effective if more was, as a consequence, conducted in meetings between Ministers and the Independent Adviser, rather than written and that Ministers may become more guarded in their disclosures if they believe that the structure or content of the declaration form is subject to public scrutiny, which also has the effect of making the process less expedient. This, in Mr Madden's view, could lead to incomplete or less candid declarations which will, inevitably, undermine the process' integrity.

    Moreover, Mr Madden considers that if the uncompleted forms and their arrangement were in the public domain and should changes be implemented, then with a patchwork of other information it might be possible to identify an individual that had been in or given rise to some difficulty and hence caused the change.

    (b) *The 'Chilling Effect':* Not only is there concern that Ministers would be inhibited from providing candid declarations, but there is also concern that disclosure

would inhibit candid, honest, or forthright advice from government officials to Ministers if they fear that their communications could later be disclosed publicly. This fear of exposure could lead to self-censorship, resulting in more cautious, vague, or restrained advice, which might undermine the quality and integrity of decision-making processes in government.

(c) *Administrative Burden:* Mr Madden is concerned that disclosure of the forms is likely to generate an increase in future Freedom of Information requests, some of which will be speculative of vexatious, which will require significant time and resources from the Appellant. In his view, this extra resource spent is not in the public interest.

(d) *Erosion of Ministerial trust in the confidential process*: Mr Madden argues that disclosure could undermine the trust between Ministers and ethics advisers, as Ministers may fear that their private interests could become public knowledge through indirect means. He gave his opinion that should the withheld information be released and should future versions of the form be altered, Ministers might adopt a narrower interpretation of the questions. This would erode confidence in the process and the current extensive declaration by Ministers might not continue. Mr Madden considers that the questions and prompts contained within the forms to be 'advice to Ministers' and accordingly, the 'uncompleted' forms demonstrate 'sensitive' advice, this is because as the process is a confidential one, any information that assists the process is sensitive. Presently, Mr Madden avers that Ministers are encouraged to 'over-declare' their interests which in turn assists the process.

(e) *Security Issues*: Although not referred to by the Qualified Person nor pleaded in grounds of appeal, Mr Madden raised concerns both in his witness statement and during oral evidence as to the increased risk of 'nefarious actors' and cyber criminals given that, in his opinion, the withheld information would confirm precisely what information is held on the IT systems of the Cabinet Office and for how long and that the information contained within the withheld information could be used to develop sophisticated cyber attacks.

43. Mr Madden does not accept the IC's view that the potential harms from disclosure are limited or speculative. He considers that the IC has not given sufficient weight to the practical realities which would flow from disclosure.

The Respondent's Position

44. In response to the Appellant's assertion that disclosure of the withheld information would induce the "chilling effect" and inhibit candid Ministerial advice, the IC contends that Officials are expected to provide frank advice regardless of potential FOIA disclosures, as found in *DEFRA v IC*. The IC emphasised that civil servants and Ministers are trained professionals who are aware of FOIA's disclosure obligations

and are expected to uphold their duties without fear of transparency undermining the quality of their advice. The IC maintained that the "chilling effect" argument is often speculative and lacks empirical evidence to support claims that disclosure genuinely inhibits the provision of candid advice.

45. The IC emphasised the public's right to understand government processes, particularly in light of recent Ministerial controversies (*APPGER v ICO*). In *APPGER*, the Tribunal stressed that transparency is a cornerstone of democratic accountability. The case established that public interest in disclosure is heightened when it relates to the integrity of public officials and government processes. The IC argues that disclosing the blank Ministerial declaration of interests forms would promote public trust by demonstrating that mechanisms are in place to manage potential conflicts of interest effectively. Given the context of controversies like Nadhim Zahawi's tax affairs, the IC contends that public confidence could be strengthened through greater transparency, which outweighs speculative concerns about potential harm.

46. The IC argues that robust existing safeguards mitigate any risk of the erosion of Ministers' confidence in confidentiality upon disclosure of the withheld information and moreover, Ministers are aware of FOIA's scope and the protections which are provided by FOIA.

Discussion and Conclusions

47. In accordance with section 58 FOIA, the issue for the Tribunal to decide upon is whether the IC's Decision Notice was in accordance with the law and whether the IC was correct in finding that the public interest in disclosure outweighed the public interest in maintaining the exemption provided in s36(2)(b)(i) and s36(2)(c) FOIA.

48. Under section 58(2) FOIA, the Tribunal is able to review any finding of fact upon which the Decision Notice was based, consider all of the evidence before it and reach its own decision.

49. Applying the law and since the parties agree that the QP Opinion is reasonable and so s36 exemptions are engaged, the following issues arise for the consideration of the Tribunal:

    (a) Does the public interest in disclosure of the withheld information outweigh maintaining the exemption under s36(2)(b)(i) and (c) FOIA?

50. In considering this issue, the Tribunal must question - where did the public interest lie on 31 January 2023 and 29 March 2023?

51. There were a number of competing public interests at this time. However, it must be remembered that the request came two days after the removal of Mr Zahawi, a senior member of the Cabinet at the time, following failures which the Prime Minister at the

time considered to be serious breaches of the Ministerial code. It is therefore fair to say that the public interest in disclosure of the withheld information was more acute two days after Mr Zahawi's removal and the letter from Sir Laurie Magnus in that there was a substantial public interest in understanding what had gone wrong, what had led to the failures of Mr Zahawi, how the process for Ministers declaring their interests works and how it was the case that Mr Zahawi was able to not declare his involvement with Her Majesty's Revenue and Customs (HMRC). Indeed, the controversy was so significant that the public interest remained at the same level at the time of the Cabinet Office decision, some two months later on 29 March 2023, as it did at the time of the request.

52. Transparency is undeniably a key public interest and, in fact, the core objective of FOIA. The tribunal considers that in general terms transparency in relation to the declaration of Ministers' interests is met in the mechanisms detailed at paragraph 41 of this Decision. However, the request which forms the subject of this appeal was made two days after the removal of the Chancellor of the Exchequer from office due to his failure to declare an investigation into his tax affairs by HMRC. Ultimately, there is strong public interest in transparency as to how "serious" the failures of Mr Zahawi, as identified by Sir Laurie Magnus, were and understanding the severity of what had happened and crucially, assurance that these circumstances will be avoided in future. The public are unable to understand that without knowing what was asked of Mr Zahawi and the process by which his declarations, and those of all Ministers are made.

53. There is nothing in the public domain to explain the declaration process other than, what we now understand to be, a filleted report from the Independent Advisor on his decision as to which interests relevant to any Ministers' portfolio are to be listed in the List of Ministers' Interests.

54. The Independent Advisor publishes an Annual Report which details his investigations for the year, including those which have gone without sanction. The report for 2022/23 makes clear Nadhim Zahawi was sacked due to breach of 'specific provisions and overriding principles'. The Tribunal queries - how can the public have any idea what the 'specific provisions and overriding principles' are without sight of the form Mr Zahawi was asked to complete?

55. There is no other information available to allow the public to fully understand what the information contained in the letter of Sir Magnus, regarding the prompts and advice given to Ministers, actually means. Sir Magnus' letter is incomplete as it is left unknown as to what is asked of Ministers. The letter makes it clear that the Independent Advisor felt that Mr Zahawi was in breach of the Ministerial code, however, the Tribunal considers that the public would not know the extent of his failure to comply having not seen the form and its questions. It is not enough to say that the public interest in relation to this specific request is already met.

56. The Tribunal has considered the opinion of the Qualified Person ('QP') and that the parties agree that the QP's opinion is a reasonable one hence the exemption claimed is engaged. However, the Tribunal must then weigh the public interests for and against disclosure by reference the harms and prejudices described. In the period from 31 January 2023 and 31 March 2023, there is substantial public interest in the content and format of the Ministerial declaration form and we agree with the IC in his assessment of the limited severity and frequency of the prejudices the Cabinet Office has described. Accordingly, the Tribunal attaches more weight to the public interest in disclosure than it does to the opinion of the QP.

57. Had there have been no recent incidents or controversies at the time of the request, then the weight attaching to the QP opinion is likely to have been greater than the public interest in disclosure reflecting the regular updates provided by the Independent Advisor via the means detailed at paragraph 41 of this Decision. However, in light of the Upper Tribunal decision in *Montague* the Tribunal finds that the weight of public interest in disclosure is more acute in the context of the timing of the request and the response of the Appellant. Accordingly, the Tribunal does not accept the Appellant's argument that "*The Commissioner placed undue weight upon "recent controversies regarding the declaration of Ministerial interests" as a public interest factor in favour of disclosure of the Disputed Information*".

58. Without sight of the blank forms, the public do not have any further information accessible to them regarding this. Accordingly, the Tribunal finds that the public interest in the requested information cannot be met elsewhere.

59. The Tribunal recognises the difference between what is in the public interest and what is of interest to the public. The Appellant argues that the public interest is primarily focused on the outcome of the process and not the detailed mechanics of it. The Tribunal does not share this view. Whilst, of course, it is the case that there is public interest in the outcome of the Ministers declaration process, there is also substantial public interest in transparency and confidence in the integrity of the process by which Ministers declare their interests. Without fully understanding the process, the public are unable to have such confidence.

60. The Tribunal has considered the purported actual harms which the Appellant considers would arise in the event of disclosure and considered both the balance of the public interest and the likelihood of the occurrence of prejudice under each category.

    (a) *Speculative Public Scrutiny:* The Tribunal does not consider that the prejudices detailed by Mr Madden outweigh the public interest in disclosure of the withheld information. This is because any Minister who takes a more narrow

view of the form and fails to make full and frank disclosures or becomes less candid would be in breach of the Ministerial code and ought to be held to account. It is easier for the public to hold Ministers to account when they fully understand the process under which Ministers make declarations. It is far more important that the process is carried out correctly, than quickly. The prejudice claimed by Mr Madden in relation to the form being amended in future, in the Tribunal's view, is not a prejudice, but indeed a positive. If the public are able to see active change as a result of controversies, changing circumstances or advice from the Independent Advisor, it can do nothing but boost the public confidence in the integrity of the process. This significantly outweighs Ministers' concerns regarding simple speculation, which, in the Tribunal's view is likely already dealt with effectively and robustly by the Cabinet Office.

(b) *The 'Chilling Effect':* It is difficult to accept the notion that our civil servants would purposefully alter their advice to Ministers as a result of uncomplete forms being disclosed to the public. There is no evidence or strong argument from the Appellant in this regard. Moreover, the Tribunal considers that senior Officials in the Cabinet Office will be experienced and adept in dealing with speculation surrounding 'advice' provided to Ministers. The Tribunal is in agreement with the Upper Tribunal in their assessment in *Department of Health v IC & Lewis [2015] UKUT 159 (AAC)* that a "*properly informed person will know that information held by a public authority is at risk of disclosure in the public interest*". The Tribunal does not consider that it is likely that disclosure of the withheld information would prejudice the Appellant in respect of a 'chilling effect'.

(c) *Administrative Burden:* The Tribunal considers that the Cabinet Office is well versed in dealing with FOIA requests and that the Cabinet Office will already have robust measures and mechanisms in place for dealing with a (likely short term) increase in FOIA requests upon release of the forms. Moreover, any requests for personal data and any vexatious requests can be relatively summarily responded to where a relevant exemption applies. It is bold to aver that any (speculative) increase in the public exercising their statutory rights is not in the public interest. That is a question to be decided in all the circumstances of each individual case where a Part II exemption applies. In the Tribunal's view, the likely prejudice to the Cabinet Office in this regard is minimal. The public interest in disclosure outweighs the public interest in the Cabinet Office having possibly to expend more resources dealing with FOIA requests for the reasons set out earlier in this Decision.

(d) *Erosion of Ministerial trust in the confidential process:* As to the Appellant's concerns regarding speculation surrounding patchwork evidence and/ or jigsaw identification, the Tribunal is not convinced that any Minister would be identifiable from examples provided in the forms. The examples provided by

way of guidance could arise from experiences from other countries which have prompted changes to the form in the UK. Having carefully considered the withheld information, the Tribunal considers the examples therein to be anodyne. In the Tribunal's view, the public interest in confidence in the integrity of the process outweighs the weight to be given to potential speculation as to which Minister, if any, the prompt may or may not be referring to. The very fact that the public can see active changes being made to future iterations of the form, particularly in the wake of failures of Ministers, instils further confidence in the process. It is of course always an option for a Minister to refuse the position should they have lost trust in the process by virtue of the public having access to uncompleted forms which Ministers are expected to complete as part of the declaration process.

(e) *Security Issues*: By Mr Madden's own admission, the Cabinet Office has in place extremely robust cyber security measures, as would be expected. Accordingly, the Tribunal does not consider that the release of uncompleted forms would threaten the security of the IT security systems of the Cabinet Office and in that regard, the likely prejudice is minimal. Moreover, the Tribunal notes that the Appellant has not relied on the relevant exemptions under s24 FOIA in respect of this purported prejudice. In the Tribunal's view, this prejudice is not relevant to the exemptions under s36 FOIA.

61. The Tribunal finds that the prejudices which the Appellant avers will flow from disclosure are overstated and in any event, will be short-lived. The failures of Mr Zahawi, as a senior member of the Cabinet, identified in January 2023, were significant and because of this, the public interest in the declaration process is acute.

62. For the reasons set out in this decision, the Tribunal does not find that the Commissioner's Decision Notice was incorrect in law. The Tribunal therefore dismisses the appeal for the reasons given above.

Signed Judge Peri Mornington Date: 12 February 2025