[2020] AACR 2

(Davies v (1) The Information Commissioner (2) The Cabinet Office (GIA) [2019] UKUT 185 (AAC))

Mr Justice Nicol
Judge Markus QC
Judge Jones
11 June 2019 **GIA/2757/2017**

Freedom of Information Act (2000); Section 36 (2) – Data Protection Act (1998) - Access to information - Closed material procedure - Provision of information

In 2015 the Department for Transport consulted on the penalty fares appeals process, including as to the independence of the Independent Penalty Fares Appeals Service. The appellant complained about the consultation process to the Cabinet Secretary and requested information under the Data Protection Act 1998 ('DPA') and the Freedom of Information Act 2000 ('FOIA') to include internal and external correspondence relating to emails he had sent.

The Cabinet Office refused to disclose internal civil service emails, relying on the exemptions in section 36(2) of FOIA and that decision was endorsed by the Information Commissioner. The appellant appealed to the First-tier Tribunal. The tribunal held an open hearing and then a closed session from which the appellant was excluded. The tribunal dismissed the appeal and provided open, but not closed reasons. It concluded that it had been reasonable for the Minister for the Cabinet Office, the "qualified person", to find that the exemption was engaged and that there was the potential for disclosure to inhibit the proper provision of written advice and exchange of ideas. Permission to appeal was granted upon the basis that in the light of the closed materials, the absence of confidential reasons meant that it was arguable that the tribunal's conclusion was irrational.

Held, allowing the appeal, that:

1. it was well established that the tribunal was entitled to adopt a closed procedure in order to protect the confidentiality of information the disclosure of which was the subject of the proceedings. However, a closed procedure did not diminish the fundamental obligation of a tribunal to give adequate reasons. If a decision could not be explained adequately without giving closed reasons, the tribunal must do so. Providing closed reasons would not help an excluded party understand the result, but they would assist the tribunal in reaching the right decision and enable an appellate court or tribunal to identify whether the decision contained an error of law (see paragraphs 14-21 of judgment).

2. the tribunal should have invited the appellant to return to the hearing at the end of the closed session so he could have been provided with as much of an explanation as possible of what took place in the closed session;

3. although a tribunal might not need to address a matter which was conceded by all parties in open proceedings and so was no longer in issue, the same could not be said of a concession made in closed proceedings because the excluded party would have had no opportunity to object to the concession

4. the qualified person's opinion that disclosure of the information would prejudice or be likely to prejudice the matters within section 36(b)(i) and (ii) and 36(c) of FOIA was not reasonable. Section 36 of the FOIA was not engaged in this case and there was no need to consider the balance of the public interest under section 2(2).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The appellant appeared in person

Mr Peter Lockley appeared for the first Respondent

Mr Richard Moules appeared for the second Respondent

DECISION

The appeal is allowed.

The decision of the First-tier Tribunal dated 19th July 2017 is set aside.

The Upper Tribunal remakes the decision of the First-tier Tribunal in the following terms:

> **The Upper Tribunal allows the appeal against the decision notice dated 23 February 2017 and substitutes a notice that the disputed information is not exempt from disclosure and must be disclosed to the Appellant within five weeks of the date on which this decision is issued to the parties.**

DIRECTION UNDER RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

The Confidential Annex to this decision must not be published nor disclosed to any person other than the Information Commissioner and the Cabinet Office without the permission of the Upper Tribunal, until at least one month after the date this decision is issued to the parties (or such later date as is required by rule 44(4)(b) or (c)) or, if any party seeks permission to appeal against this decision, until final disposal of the permission application and any ensuing appeal or any contrary order by the Court of Appeal.

REASONS FOR DECISION

Introduction

1. Dr Davies has had a long-standing concern regarding the actions and independence of the Independent Penalty Fares Appeals Service ('IPFAS'). He considers that IPFAS cannot properly be described as "independent" because it is part of one of the train operating companies. Our decision on this appeal conveys no view, one way or the other, as to whether there is any merit in that concern. He has been in correspondence with the Department of Transport about it. In response to an earlier Data Protection Act request, the Department had

disclosed emails in which junior officials in the Department had made rude comments about him and for which the Department subsequently apologised. Dr Davies used the complaints system within the Department for Transport but remained dissatisfied with the position.

2. In February 2015 the Department consulted on the penalty fares appeals process, including as to the independence of IPFAS. In April 2015 Dr Davies wrote to the Cabinet Secretary (Sir Jeremy Heywood), complaining about the consultation process and requesting information under the Data Protection Act 1988 ('DPA') and the Freedom of Information Act 2000 ('FOIA'). On 15th May 2015 he repeated the request, adding more detail:

> "All internal correspondence, including, but not limited to, emails, letters, notes of meetings, minutes, actions, notes of telephone calls, relating to and or generated by my emails to Sir Bob Kershaw [sic – should have read Kerslake], Sir Jeremy Heywood, Mr John Manzoni and Mr Mark Doran.
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> All external correspondence including but not limited to emails, letters notes of meetings, minutes, actions, notes of telephone calls, relating to and or generated by my emails to Sir Bob Kershaw [sic], Sir Jeremy Heywood, Mr John Manzoni and Mr Mark Doran.
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> Any other relevant discussions and correspondence with Mr Philip Rutnam or any of the officials at the Department for Transport, and with the Minister.
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> Anything else related to penalty fares on the railway and penalty fares appeals on the railway that is related to my campaign."

3. The Cabinet Office disclosed some of the information under the DPA and some other information under FOIA. It refused to provide some information on the basis that it was exempt third-party data under section 40(2) of FOIA and refused to provide the remainder in reliance on section 36(2)(b) and (c) of FOIA. These proceedings are concerned only with the Cabinet Office's reliance on section 36 of FOIA which provides:

> "(1) This section applies to—
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> (a) information which is held by a government department ... and is not exempt information by virtue of section 35, …
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> (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—
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> (a) ...
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> (b) would, or would be likely to, inhibit—
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> (i) the free and frank provision of advice, or
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> (ii) the free and frank exchange of views for the purposes of deliberation, or
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> (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs…

(5) In subsections (2) and (3) "qualified person" —

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

4. Mr Mathew Hancock, Minister for the Cabinet Office, was the qualified person upon whose opinion the Cabinet Office relied in this case. He received a letter from the relevant civil service team recommending that he confirm that in his reasonable opinion all of the information that it was proposed to withhold was exempt under section 36(2)(b)(i) and (ii) and (c). The material parts of the advice was as follows:

> "7. …the [redacted] require candid advice and briefings from officials when responding to correspondence. Without this candid advice they would not be sufficiently well informed on the issues raised by the correspondents and the responses to such correspondence would be based on insufficient information. Civil Servants must be able to discuss important issues freely and frankly with the [redacted], exchange views on all available options and understand their potential implications. Disclosure would weaken Civil Servant's ability to brief both senior officials fully and frankly. Disclosure would lead officials to expect that this sort of advice could be disclosed in the future. They would consequently frame their advice in light of this expectation. While this would not lead to a failure to provide full advice on all relevant matters, there would be a tendency to provide such advice orally rather than in writing. This would upset the arrangements for the giving of advice to senior officials by inhibiting the free and frank provision of official advice and curbing the free exchange of ideas between civil servants and senior officials."

5. The letter went on to observe that, although the question of public interest was not relevant to whether section 36 was engaged, there was a general public interest in disclosure of information and that openness in government may increase public trust and engagement, but that there was a stronger public interest in the provision of free and frank advice. The letter also noted that the information was less than two years old. Mr Hancock's response was conveyed in an email stating that "The Minister has cleared the use of section 36 in this case".

6. In the decision notice of 23 February 2017, the Information Commissioner notified her decision that the Cabinet Office had correctly relied on the exemptions in section 36(2). Dr Davies appealed to the First-tier Tribunal (F-tT) on a number of grounds including that disclosure would not have the chilling effect claimed and that the public interest favoured disclosure.

7. The Information Commissioner and the Cabinet Office provided written submissions to the First-tier Tribunal. In a confidential annex to her submissions, the Commissioner observed that one of the withheld emails may fall to be treated differently to the rest of the disputed information. The Cabinet Office filed a closed submission asserting that the exemption also applied to that email. The F-tT heard the appeal on the 12 July 2017. After the open hearing, the tribunal went into a closed session from which Dr Davies was excluded and he was invited to leave the building.

8. In a written decision dated 19 July 2017 the F-tT dismissed Dr Davies' appeal. The tribunal provided open but not closed reasons. The F-tT set out the parties' submissions and, in so far as relevant, concluded as follows:

> "16. The Minister for the Cabinet Office, in coming to his opinion was advised of and shown the information falling within the request, which parts were to be disclosed (a briefing on the penalty fares regime prepared by DfT) and which were not (internal civil service emails). The submission identified the decision the Minister was required to consider and the arguments with respect to the impact of disclosure, the requirement for candid advice in responding to correspondence, and the concern that disclosure would lead officials to expect future disclosure in such cases and tailor their written communications accordingly inhibiting the free and frank provision of advice and curbing the free exchange of ideas. The tribunal is satisfied that the submission provided a proper basis upon which the Minister could reasonably come to the conclusion that the exemption was engaged and showed the potential for disclosure to inhibit the proper provision of written advice and exchange of ideas.
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> 17. With respect to where the balance of public interest lay Mr Davies argued that it was important to reveal whether there were abusive comments within the emails. This is a purely private interest of Dr Davies arising out of his earlier experience of junior DfT officials. As the respondents correctly identified it was inherently improbable that senior officials in the Cabinet Office would behave in such a way and they had not. There was no public interest in disclosing the emails on this basis. He also argued that disclosure of the emails would inform the public debate about the lack of independence (as he saw it) of IPFAS. This argument is entirely lacking in substance. The DfT had, very shortly before the request, published a consultation document exposing the issue to public scrutiny releasing these emails would add not assist one iota in informing the public. Some weight must be given to the public interest in upholding the exemption, especially as a qualified person has given an opinion that the exemption is engaged. There is effectively no weight on the other side of what is essentially a private interest in continuing to pursue a personal complaint."

9. Having been refused permission to appeal by the F-tT, Dr Davies applied to the Upper Tribunal for permission to appeal. Following an oral hearing, Upper Tribunal Judge Markus QC refused permission to appeal on the grounds advanced by Dr Davies. However, prior to that hearing she had identified an additional issue as to the adequacy of the F-tT's reasons in the light of the closed materials and the issue raised in the Commissioner's confidential annex in the F-tT proceedings. Counsel for the Commissioner and Cabinet Office addressed this issue in a closed session of the permission hearing. Amongst other things, they submitted that the Upper Tribunal could not address matters which had not been the subject of Dr Davies' grounds of appeal to either the F-tT or the Upper Tribunal. Judge Markus gave permission to appeal as follows:

> "2. First, it is arguable that the tribunal failed adequately to explain why it decided that the sentence addressed by the Information Commissioner in the confidential annex of 28 April 2017, was exempt from disclosure. The F-tT task was to decide for itself whether the disputed information was exempt. This document raised particular issues as to the public interest balance, broadly identified in the Commissioner's confidential annex, and it is arguable that the F-tT should have explained how it resolved those issues. Arguably the F-tT's open reasons are inadequate to do so and so, arguably, it should have provided confidential reasons for that purpose.
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> 3. This is linked to the second reason for giving permission, which is a more general concern about the absence of confidential reasons. The F-tT's open reasons could not, of course, explain the F-tT's decision by reference to the closed material itself. Yet it

> seems to me that the questions of the reasonableness of the QP opinion and the public interest may only be capable of being explained adequately by reference to that material. On scrutiny of the closed material, I have some difficulty in understanding how substantial parts of it could have much if any bearing on the chilling effect and, in the absence of adequate reasons, it is arguable that the F-tT's conclusion was irrational.
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> 4. I am not persuaded by the respondents' submissions that neither of the above issues can properly form part of the appeal. As set out above, disclosure of all the disputed information was in issue before the F-tT. The appellant is not in a position to identify the matters in respect of which I have given permission to appeal, as he has not seen the closed material. Mr Lockley accepted that, if there was a palpable error of law, the Upper Tribunal should address it even though the appellant has not raised it. Thus, on his case, there is no reason in principle why the Upper Tribunal should not deal with an issue which it identifies on consideration of the closed material. If correct the respondents' submissions would mean that there could be no challenge to a tribunal's decision relating to matters which have not been disclosed to a party unless those privy to the closed material wish to challenge. On that basis, the parties to the closed proceedings could, by agreeing with the F-tT, deprive the Upper Tribunal of jurisdiction in regard to closed matters. I acknowledge the unique role of the Commissioner in securing the proper application of FOIA but it is also the case that the Commissioner may take a view which, on being tested by the Upper Tribunal, is incorrect. The overriding objective and the requirements of procedural fairness and natural justice mean that the Upper Tribunal must take particular care when considering matters which are closed to one party. My approach is not incompatible with the Tribunal's duty to act impartially and judicially."

10. The written submissions sent by the respondents following the grant of permission, and the approach manifest there, raised important issues about fairness in the context of closed proceedings. Judge Markus directed an oral hearing of the appeal and, on 21 January 2019, the Chamber President directed that the appeal be heard by a three-judge panel. The parties provided skeleton arguments for the hearing. In their skeleton arguments the respondents conceded the first of the two grounds identified by Judge Markus and, on that basis, submitted that the F-tT's decision should be set aside and the appeal remitted to another tribunal. They maintained their opposition to the second ground.

11. A substantial part of the hearing of this appeal before the three-judge panel took place in closed session from which Dr Davies was excluded. This was necessary because the focus of the appeal was on the approach to the disputed information which could not be disclosed to Dr Davies. In accordance with the approach approved by the Court of Appeal in *Browning v The Information Commissioner and The Department for Business, Innovation and Skills* [2014] EWCA Civ 1050, about which we say more below, the closed proceedings were conducted in an investigatory rather than fully adversarial manner. We were greatly assisted in this by both of the respondents' counsel. When the open part of the hearing re-commenced, Dr Davies was provided with a detailed gist of what took place in the closed hearing, and a written version of this was subsequently prepared by Mr Lockley and sent to the parties (including Dr Davies) and the Upper Tribunal. We commend counsel for positively engaging with the difficult and important task of minimising the disadvantage caused to Dr Davies by reason of there having been a closed procedure.

12. We have provided a confidential annex to this decision containing those aspects of our reasoning which refer to closed material or closed submissions. If neither respondent appeals against our decision, or if any appeal is unsuccessful, then that reasoning need not remain confidential. The time limit in the information rights jurisdiction for making an application to the Upper Tribunal for permission to appeal to the Court of Appeal is one month from the date that the Upper Tribunal's written reasons are issued: see Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), rule 44(4)(a). The one-month time limit may also run from one of the special circumstances set out in rule 44(4)(b) and (c), eg notification that an application under rule 43 for the decision to be set aside for procedural reasons is unsuccessful. We have therefore directed that the confidential annex will remain confidential until at least one month after the date this decision is issued to the parties (or such later date as is required by rule 44(4)(b) or (c)) or final disposal of an application for permission to appeal and subsequent appeal. The effect of this decision is that (barring one of those special cases) the confidentiality will be removed one month after this decision is issued, unless within that time a party makes an application to the Upper Tribunal or (if permission is refused by the Upper Tribunal) to the Court of Appeal for permission to appeal to the Court of Appeal. In that event, and subject to any contrary order of the Court of Appeal, the confidentiality order will continue until disposal of the permission application and any ensuing appeal but will then be discharged. If the confidentiality order is discharged, the confidential annex will then be added to the publicly available decision and copied to Dr Davies, with the confidentiality marking removed. In that event, any reference in this decision to the "confidential annex" should be understood accordingly.

The grounds of appeal

13. Both grounds of appeal are concerned with the F-tT's duty to give reasons in a case in which a closed procedure has been adopted.

14. It is important to start by making clear that all parties to this appeal agreed that the F-tT was entitled to consider closed material and submissions, and to hold a closed hearing. It is clearly established and uncontentious that the F-tT is entitled to adopt a closed procedure in order to protect the confidentiality of information the disclosure of which is the subject of the proceedings. The applicable principles and approach to closed material and closed proceedings have been set out by the Court of Appeal in *Browning*, in particular at [33] to [36]. The Commissioner's counsel has an important role in closed session in assisting the F-tT to test the evidence and arguments put forward by the public authority and the tribunal itself can be expected, where appropriate, to assess for itself whether the provisions of FOIA apply to the closed material, adopting a procedure which is at least in part investigatory rather than adversarial.

15. As explained in *Browning* at [35], it is important that a tribunal does its utmost to minimise the disadvantage of a closed procedure including by disclosing as much as possible of what has transpired. We note in passing that it is most unfortunate that, in this case, the First-tier Tribunal does not appear to have had that duty fully in mind. It invited Dr Davies to leave the building after the open hearing had concluded (which he did) and thereby ruled out any possibility of Dr Davies being provided with a gisted explanation of what had occurred in the closed hearing and allowing him to make such submissions as he was able in regard to that gist. As our experience in the appeal before us shows, it was likely to have been possible to tell Dr Davies quite a lot about what took place at that hearing.

16. The adoption of a closed procedure does not diminish the fundamental obligation of a tribunal to give adequate reasons, meaning that they "must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues'.": *South Bucks District Council v Porter (No.2)* [2004] UKHL 33 [2004]; 1 WLR 1953 at [36]. Adequate reasons perform a number of important functions. They enable the parties to understand why one has won and the other has lost; they impose a discipline on the court or tribunal in focussing on relevant issues and ensuring that its decision is sound; and they enable a person affected by a decision or the appellate court or tribunal to judge whether the decision is lawful.

17. In *Browning* Maurice Kay LJ said at [35] that, following a closed procedure a tribunal is under a duty to adopt maximum possible candour when writing the reasoned decision. This will include being told "at least whether, and as far as reasonably possible without giving the content of the material away, to what extent, the material made a difference": *Amin v Information Commissioner and DECC* [2015] UKUT 0527 (AAC) at [80]. As Upper Tribunal Judge Turnbull said later in that same decision, if the tribunal is able to explain its decision without making use of closed reasons, so much the better. But if the decision cannot be explained adequately without giving closed reasons, the tribunal must do so rather than risk its decision being held to be wrong in law for inadequate reasons. Providing closed reasons will not assist in the parties who have been excluded from the closed hearing or third parties understanding the result. But they will assist in fulfilling the other two functions of reasons which we have set out above: assisting the tribunal to reach the right decision and enabling the appellate court or tribunal to identify whether the decision contains an error of law.

18. It follows that, even though the whole of the reasons may not be open, the required standard of reasons in a closed procedure case is no lower than that required in any other case.

19. There is one particular consequence of this analysis which we mention here, although it does not strictly arise for determination in this case. In written observations accompanying case management directions in this appeal, Judge Markus said in relation to closed reasons:

> "…even though the requester will not be in a position to consider and challenge those reasons, the Upper Tribunal (pursuant to its duty to act inquisitorially and to minimise the disadvantage to the requester of a closed procedure) may itself consider whether there is any issue of law arising from the closed reasons. Indeed, I do not presently see why a requester could not appeal to the Upper Tribunal even if she or he can identify no issue of law in the open reasons and ask the Upper Tribunal to consider whether the decision is lawful in the light of the closed reasons. Dr Davies submits that the approach of the respondents deprives the Upper Tribunal of the opportunity to scrutinise the F-tT's approach to a matter raised in closed."

20. In response the Commissioner stated that she agreed that a requester could ask the Upper Tribunal to ascertain whether the decision was lawful in the light of the closed reasons, but said that such a procedure was only likely to be appropriate where distinct issues were raised in a closed decision or it contained free-standing legal reasoning. The Commissioner submitted that it was not likely to be appropriate in the more common type of closed decision, where examples are given by reference to disputed information or other sensitive material, in order to support propositions given in the open reasons. We have not had the benefit of argument on this point but these observations appear to us to be correct and consistent with

the following views of the Upper Tribunal in *APPGER v The Information Commissioner and Foreign and Commonwealth Office* [2013] UKUT 0560 (AAC):

> "43. It seems to us that there is strength in the view that we could have refused to embark on the examination of the documents in closed session that all the parties invited us to carry out, on the basis that the open explanation given by the F-tT of its decision is adequate. However, we were persuaded to carry out this closed examination because we agree with Mr Pitt-Payne's points that the rationale for providing reasons extends beyond the giving of open reasons to a party who is excluded from seeing the relevant documents and, in some cases (we emphasise "some") there may be a need to provide detailed closed reasons to inform the appeal court or tribunal of the reasoning process by reference to the contents of the documents.
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> 44. However, we pause to add that it seems to us that in many cases permission to appeal on the basis of a "reasons challenge" should not be given simply on the basis that the excluded party has not seen the documents or the closed reasoning (if any) and wants the appeal court or tribunal to check the conclusions reached on the application of an exemption to the requested information. In any event, when dealing with an application for permission the court or tribunal can consider the impact of the closed reasoning."

21. We now turn to the two grounds of appeal. It is convenient to deal with ground 2 first because what we have to say there about the approach to reasons is also relevant to our decision under ground 1.

Ground 2: Failure to give adequate reasons

22. In deciding whether the reasons in the present case were adequate, we remind ourselves of the approach summarised by Judge Markus in *DH v Information Commissioner and Bolton Council* [2016] UKUT 0139 (AAC) at [34]:

> "Counsel for both Respondents have reminded me of the importance of the Upper Tribunal exercising restraint when faced with a challenge to a decision of the First-tier Tribunal and in particular when the reasons which it gives are being examined. As Lord Hope said in Jones v First-tier Tribunal & CICA [2013] UKSC 19 at [25], "The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.". Applying Jones in UCAS v Information Commissioner and Lord Lucas [2014] UKUT 557 (AAC) Upper Tribunal Judge Wikeley said at [59]: "The question is rather whether the Tribunal has done enough to show that it has applied the correct legal test and in broad terms explained its decision...".

23. The adequacy of reasons is also to be assessed in the light of the issue to be determined. In the present case, one of the issues to be decided by the First-tier Tribunal was whether the qualified person's opinion was reasonable.

24. In *Information Commissioner v Malnick and The Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC); [2018] AACR 29, a three-judge panel of the Upper Tribunal held at [56] that section 36(2) of FOIA is concerned with substantive rather than procedural reasonableness of the qualified person's opinion.

25. There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of public affairs are to

be treated with some caution. In *Department for Education and Skills v Information Commissioner and Evening Standard* EA/2006/0006, the F-tT commented at [75(vii)] as follows:

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

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

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

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

> "27. …The lack of a right guaranteeing non-disclosure of information ...means that that information is at risk of disclosure in the overall public interest … As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that … a person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed…
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> 28. …any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest.
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> 29. … In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way:
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> i) this weakness,
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> … is flawed."

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

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

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

31. In the present appeal, the F-tT's reasons regarding the qualified person's opinion are at paragraph 16 of its decision. The basis of the likely chilling effect there was "the concern that disclosure would lead officials to expect future disclosure in such cases and tailor their written communications accordingly inhibiting the free and frank provision of advice and curbing the free exchange of ideas". This is no more than a statement that disclosure was likely to have a chilling effect on the provision of advice and exchange of ideas; it was in essence a statement that section 36(2) applied but was devoid of any reasoning as to why. The letter of advice to the minister did not provide any additional material reasoning. While it set out in a little more detail the adverse consequences of inhibition in the provision of advice and exchange of views, it did not provide any evidence or any factual or reasoned basis for concluding that such inhibition would or would be likely to be caused by disclosure of the material in question. The other parts of the F-tT's decision referring to the respondents' submissions do not shed any further light on the basis for this part of the decision.

32. Mr Lockley submitted that it could be inferred that the F-tT's decision was based on the sensitive content of the documents because they were emails written in response to correspondence which was a formal complaint by Dr Davies. We disagree. This explains something about their context, albeit at a very general level, but says nothing about the

content of the documents, their particular sensitivity, or why disclosure of them would be likely to risk the prejudice with which section 36(2) is concerned.

33. There is nothing in the F-tT's reasoning to indicate that the F-tT had in mind the weaknesses of the chilling effect arguments identified by Charles J in *Lewis* at [27] to [28] nor the need for careful fact-finding as explained by him at [69], even if read along with the qualified person's opinion as that also failed to address those matters. Even though the F-tT could not have referred in its open reasons to the content of the withheld emails, it could at least have indicated that it had reached its conclusions in the light of the particular documents in question and may have been able to say more about the basis for reaching its conclusion as to risk of prejudice. If the F-tT could not adequately explain its decision in open reasons, it was bound to fill the gap by giving closed reasons. The consequence of having failed to do so is that it is impossible to tell why the F-tT found that, in the circumstances of this case, the qualified person's opinion was reasonable. The only reasons given are inadequate.

34. Before leaving this ground, we address one other issue raised by Dr Davies. He referred to the observation by Lord Walker in *BBC v Sugar (No. 2)* [2012] UKSC 4, [2012] 1 WLR 439 at [76] that there is "a strong public interest in the press and general public having the right…to require public authorities to provide information about their activities", and submitted that this public interest should have weighed in the balance in favour of disclosure regardless of the tribunal's assessment of the specific interests in disclosure on which Dr Davies had relied and which the tribunal had found to be private. We are satisfied, however, that this submission involves a misreading of Lord Walker's observations which were directed to a different point. When considering the public interest balance, the correct position was explained by Charles J in *Lewis* at [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 section 2(2)(b) requires)."

Ground One

35. This ground was conceded by the respondents prior to the hearing. For the reasons which follow, we agree with their concession.

36. Counsel for the Commissioner had identified, in the confidential annex to the Commissioner's response in the F-tT, the possibility that one of the withheld emails may attract different considerations to the generality of the withheld information. This is an example of the Commissioner's important non-adversarial role in FOIA appeals, her commitment being to ensure the proper application of the legislation.

37. The problem identified in this ground arises from what then occurred in the F-tT. The Commissioner explained that the issue relating to a single sentence in the email was discussed

in the closed session of the oral hearing and that, by the conclusion of the discussion, "the respondents agreed with the F-tT that there was insufficient evidence about the context in which the single sentence arose to justify treating it differently from the remainder of the withheld information. As a result, the F-tT decision treated the withheld information as a whole". The tribunal said nothing about the email in question in its reasons. The respondents' position in this appeal had, originally, been that there was no error of law in the tribunal's approach. It was not required to justify its approach to material on a sentence-by-sentence basis and it should not be assumed, merely because it had not mentioned a specific issue, that it had not given proper consideration to it.

38. The respondents' subsequent concession of this ground was based on their acceptance that the issues raised in the single sentence were distinct from those raised in the remainder of the disputed information. Their position was that in some cases it may be permissible to treat the disputed information as a whole for the purpose of the public interest balancing test, even though different elements raise different public interests or engage those interests to different degrees. We do not need to decide whether that submission is correct because the respondents submit that the public interests engaged in the sentence in issue in this appeal were sufficiently distinct that they had to be treated differently. We agree with that and so allow the appeal on ground one.

39. In the light of the respondents' concession, we do not need to decide whether there were any other errors of law in the tribunal's treatment of the single sentence. Nonetheless we make some further observations because the approach of the tribunal and the Information Commissioner to the issue in the proceedings below raises some important underlying issues as to the conduct of closed proceedings.

40. First, while the tribunal was not required to record every issue considered, it could not properly avoid addressing the principal issues which were before it. Had a party submitted, in open proceedings, that one particular document was different in character and required different treatment from the remainder, the tribunal would have been bound to explain why if it rejected that submission. As the Commissioner agrees, the F-tT's obligation to give reasons is not diluted simply because an issue is raised in closed session. Indeed, in the light of the disadvantages to the excluded person and the derogation from the principle of open justice, tribunals should be particularly astute to ensure that their reasons as a whole (including closed reasons) adequately and clearly explain their decision by reference to the relevant material.

41. Second, in the Commissioner's skeleton argument Mr Lockley said:

> "It must be permissible for the parties to a closed procedure to 'agree an outcome', in the sense that the parties may concur as to the correct disposal of an issue. This is what happened in the present case. The Commissioner recognises her obligation to test the position of other parties in a closed procedure, and to put points the requester might have wished to put. She did so here — raising the issue of the single sentence and setting out the competing concerns both in writing and orally — but was ultimately persuaded, on the basis of the evidence available, that disclosure was not warranted."

42. For the parties to discuss an issue in a closed hearing and "agree" an outcome, even though that outcome is contrary to that sought by the excluded party, involves the opposite of the rigour and care which is expected of the tribunal and of the Commissioner in avoiding as far as possible the disadvantage faced by the excluded party. Although a tribunal may not

need to address a matter which is conceded by all parties in open proceedings and so is no longer in issue, the same cannot be said of a concession made in closed proceedings because the excluded party will have had no opportunity to object to the concession.

43. Third, as the respondents also agreed, consistently with the guidance in *Browning* the F-tT should have invited Dr Davies to return to the hearing at the end of the closed session so that it could provide him with as much of an explanation as possible of what took place in the closes session. As our experience in this appeal shows, it is frequently possible to reveal a great deal of what took place. In any event, it will normally be possible to tell the excluded person at the very least the nature of what transpired, even if the content cannot be revealed.

44. Finally, we welcome the fact that the respondents resiled from their original positions that it was not open to the F-tT to have addressed the question of disclosure of the single sentence, and that the Upper Tribunal could not consider it on appeal, on the ground that the issue had not been raised by Dr Davies. It is clear that the F-tT was bound to consider the issue once raised by the Commissioner or, indeed, if it had identified the issue for itself: see *Birkett v Department for Environment, Food and Rural Affairs* [2011] EWCA Civ 1606; [2012] AACR 32 at [58]. The Upper Tribunal's task is to decide whether the F-tT's decision was lawful. Pursuant to its inquisitorial function, there can be no objection to the Upper Tribunal identifying potential errors which have not been raised by a party. This is particular important where the matters in question have been dealt with only in closed proceedings and so the appellant has no ability to identify errors arising therefrom.

Relief

45. Section 12(2) of the Tribunals Courts and Enforcement Act 2007 provides that, where the Upper Tribunal finds that the decision of the F-tT involved an error of law, the Upper Tribunal may (but need not) set aside the decision of the and, if it does so, must either remit the case to the F-tT for reconsideration or remake the decision. When the F-tT allows an appeal, it must also substitute a correct decision notice: *Malnick* at [103]. Section 12(4) provides that, in remaking the decision, the Upper Tribunal may make any decision which the F-tT could make if the F-tT were re-making the decision.

46. In the present case, it is appropriate to set aside the F-tT's decision. The inadequacy in the reasoning in this case is fundamental and the decision cannot stand in the light of it. Dr Davies submitted that we should remake the decision, but the respondents contended that we should remit the appeal to another F-tT. We decided that we should remake the decision. The proceedings have been going on for a long time and concern a request for information made over four years ago. Having seen the closed material, we were satisfied that the appeal turned on limited factors all of which we were in a position to address on the evidence which was available to us. Mr Moules informed us that the Cabinet Office did not wish to adduce further evidence. The parties had provided to the F-tT all the evidence which they had considered was relevant to the material (other than the single sentence) and there had been no material change since then which could justify calling further evidence. We heard oral submissions from the parties as to the merits of the appeal and, in addition, provided the parties with an additional opportunity to make further written submissions (in the event, no party took advantage of that).

47. Dr Davies' position was straightforward: he sought disclosure of as much of the disputed information as possible. As he had not seen it, he could not say anything specific about the prejudice arising from or the benefits of disclosure.

48. The Information Commissioner's position was that the public interest favoured disclosure of the single sentence. However, the public interest favoured withholding the remainder of the information. Mr Lockley submitted that there was nothing to weigh in the balance for disclosure. There was a very small public interest in favour of the exemption, taking into account the context. The information related to responses to a complaint made by someone described as a persistent complainant (a description with which Dr Davies took issue), and the qualified person's opinion on actual or likely prejudice was a reasonable one.

49. The Cabinet Office submitted that all the disputed information should be withheld. In addition to the matters relied on by Mr Lockley, Mr Moules pointed to the seniority of the individuals who were party to the correspondence, that at the time of the refusal of the request the information was less than two years old. The Cabinet Office recognised that there was a general public interest in disclosure and that openness in government may increase public trust in and engagement with government but submitted this was outweighed by the factors favouring the exemption.

50. We have decided that the disputed information was not exempt from disclosure pursuant to section 36 of FOIA. We explain our conclusion in this regard in more detail in the confidential annex to this decision, by reference to the disputed information. In these open reasons we can give some explanation for the decision.

51. First, in relation to all the material save for the single sentence we have decided that the qualified person's opinion that disclosure of the information would prejudice or be likely to prejudice the matters within section 36(b)(i) and (ii) and 36(c) of FOIA was not reasonable. We have taken into account the seniority of the qualified person, and that he was well-placed to make the assessment. However, the opinion was essentially an assertion that those statutory provisions applied. In particular, the opinion did not address the factors at paragraphs [27] and [28] of *Lewis.* We have been provided with no evidence or other material to suggest that there was anything specific to the withheld information which would have been likely to inhibit the giving of advice or to cause ministers or civil servants to be reticent in their discussions, or that there would have been even minimal prejudice to the effective conduct of public affairs. The material is extremely anodyne.

52. Second, as far as the single sentence is concerned, for reasons which we explain in the confidential annex, we are satisfied that it was not reasonable for the qualified person to conclude that there was a risk of prejudice within section 36(b) or (c) of FOIA if this material was disclosed.

53. In the light of the above, we conclude that section 36 of FOIA was not engaged in this case and there is no need to consider the balance of the public interest under section 2(2). However, even if we had found that section 36 was engaged, we would have found that the public interest in maintaining the exemption did not outweigh the public interest in disclosure. We are satisfied that there was a very small public interest in disclosure of the material other than the single sentence, and a greater public interest in disclosure of that sentence, for reasons which we explain in the confidential annex. If there was any public interest in withholding the material, it was certainly no greater than that in disclosing it. The Cabinet

Office has advanced no specific basis for saying that the seniority of the authors of the correspondence was relevant in this case and we are satisfied it was not: see *The Cabinet Office v The Information Commissioner and Webber (GIA)* [2018] UKUT 410 (AAC) at [40].

54. Our conclusions are unaffected by the fact that, at the time of refusal of the request, the withheld information was only six weeks old and that (so we are told) Dr Davies continued to pursue related avenues of complaint. The respondents did not explain in what way these considerations were relevant and, in the light of our closed reasons, we conclude that they were not.

55. Accordingly, we remake the First-tier Tribunal's decision in the terms set out at the beginning of this decision.

~~CONFIDENTIAL~~ ANNEX

The material other than the single email

1. We are concerned only with those parts of the closed materials which are not coloured. The parts coloured in pink were withheld under section 40(2) of FOIA. The parts coloured in green were disclosed to Dr Davies.

2. The uncoloured material at pages 14 to16 and 10 to 11 of the closed bundle comprises covering emails (the attachments and content which they covered having been omitted), a request for the background to points raised by Dr Davies (that phrase was disclosed), "advice on handling", and requests between civil servants for a note or a draft reply. The Cabinet Office has not provided any evidence to show that disclosure of this material would or would be likely to give rise to prejudice or inhibition within section 36(2). There is nothing in this material which could possibly give rise to such prejudice.

3. Page 13 comprises the single email, which we address below. This is followed by a draft response from John Manzoni (Chief Executive of the Civil Service) to Dr Davies. We do not know whether this was materially different from the response which was sent to Dr Davies, but the draft response is entirely innocuous. It summarises the previous correspondence between Dr Davies and the Department for Transport, states that all departmental avenues had been exhausted and that, therefore, it would not be appropriate for Mr Manzoni to become involved in the complaint. Disclosure of the draft response could not give rise to a risk of prejudice or inhibition within section 36(2)(b) or (c). On the same page there is a covering email, most of which has been disclosed, and disclosure of it could not possibly give rise to prejudice within section 36(2).

4. Page 12 is an email of 6 April 2015, most of which has already been disclosed to Dr Davies. What is left reads as follows:

> "first I had seen of this when I saw philips response.
> trouble with such a rambling email from the complainant is that its hard to make sense of!! However – in this case I think …..
> can you do that please?"

5. There is nothing in disclosure of the above that could give rise to a chilling effect, save possibly the middle sentence. However, in the absence of any evidence to suggest that it would be likely to do so, we think it is a very remote possibility. Those concerned would have been aware of the risk of disclosure. Indeed, the single email of 1 April 2015 shows that they were aware of that risk and so would not reduce to writing those matters which they did not want to risk being disclosed. In addition, the comment is so bland that we cannot conceive that, if it was disclosed, civil servants would be likely to be deterred from communicating with each other in the future.

6. We conclude that the qualifying person's opinion that disclosure of this material would give rise to actual or likely prejudice within section 36(2) is not reasonable.

7. In any event, even if the opinion was reasonable, and giving weight to it in the public interest balancing exercise, we would have concluded that the public interest favoured

disclosure. The material gives a flavour of the way in which complaints are handled by the civil service. There is some public interest in knowing that. Any chilling effect would be slight and certainly not sufficient to outweigh the public interest in disclosure.

The single email

8. The email is dated 1 April 2015 and is between Mark Doran (PPS to Mr Manzoni) and Mr Manzoni. It attached a suggested response to Dr Davies and then stated:

> "For legal and FOI reasons, probably best for us to discuss any queries on Philip's email next week rather than engage in discussion on email."

9. The qualified person did not address this email separately from the rest of the material.

10. We accept that the email itself provides some support for the Cabinet Office's case that the risk of disclosure under FOIA may have deterred these civil servants from putting matters in writing and so is evidence of some chilling effect arising from the general risk of disclosure. However, it does not show that disclosure of this particular email would or would be likely to have that effect. There is no material before us on which we can conclude that disclosure of an email showing that civil servants sometimes decide not to reduce matters to writing would be likely to cause further inhibition.

11. It follows that the qualified person's opinion in this regard was not reasonable. In any event, as the Commissioner had originally identified in her confidential annex for the First-tier Tribunal, there is a public interest in knowing that civil servants sometimes deliberately avoid generating written information in order to keep it confidential. The effect of such behaviour could be to bypass the provisions of FOIA which is designed to achieve structured and transparent decisions as to disclosure of information. The practice may mean that matters which ought to be recorded and disclosed to the public are kept secret. We do not consider it likely that disclosure of the email would further deter frank communications, and we have been provided with no other evidence to suggest that it would. But even if it did, it does not outweigh the public interest in disclosing it.