NCN: [2023] UKFTT 00688 (GRC)
Case Reference: EA/2022/0180

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: remote video hearing (cloud video platform)

Heard on: 28 February 2023
Decision given on: 25 August 2023

Before

TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER JO MURPHY
TRIBUNAL MEMBER ROSALIND TATAM

Between

DEPARTMENT FOR EDUCATION

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: Robert Cohen of Counsel, instructed by Rachel Hoyle and Gemma Benson of the Government Legal Department
For the Respondent: Clíodhna Kelleher of Counsel, instructed by Nicholas Martin of the Information Commissioner's Office

Decision: The appeal is Allowed in part

Substituted Decision Notice:

The Tribunal's Decision Notice in case reference EA/2022/0180, set out below, is substituted for the Commissioner's Decision Notice reference IC-117253-J6C0 dated 7 June 2022 with regard to the request for information made to the Department for Education by the Staploe Education Trust dated 12 November 2020.

Substituted Decision Notice

1. The Department for Education is entitled to rely on section 42 of the Freedom of Information Act 2000 to withhold the part of the requested information which constitutes legal advice (being the last column of the table in paragraph 40 of the Department for Education's internal Ministerial submission relating to the St Bede's Free School Project' dated 28 September 2020).

2. The Department for Education is entitled to withhold the personal information of individuals which is contained in the requested information, in accordance with section 40(2) of the Freedom of Information Act 2000.

3. The Department for Education is not entitled to rely on sections 36(2)(b)(i), 36(2)(b)(ii) or 36(2)(c) of the Freedom of Information Act 2000 to withhold the remainder of the requested information because, whilst those sections are engaged, the public interest favours disclosure.

4. The Department for Education breached section 10 of the Freedom of Information Act 2000 by not responding to the request for information within twenty working days.

5. The Department for Education must disclose the withheld information which was provided to the Tribunal, except for the information specified in point 1 above regarding section 42 of the Freedom of Information Act 2000, subject to any redactions of personal data pursuant to section 40(2) of the Freedom of Information Act 2000.

6. In addition, the Department for Education must make a fresh response to the request for information. The fresh response must make clear what further searches were undertaken, and whether or not any further information (beyond that referred to in point 5 above) is held within the scope of any parts of the request, unless the duty to confirm or deny does not arise in accordance with any applicable provision of the Freedom of Information Act 2000. If such further information is held, the Department for Education must either disclose it or claim any relevant exemptions to disclosure.

7. The Department for Education must disclose the withheld information and issue the fresh response within 35 days of the date on which this decision is promulgated.

8. The further disclosure and fresh response (both as pursuant to point 6 above) will be subject to the rights given under s50 of the Freedom of Information Act 2000 to make a new complaint to the Information Commissioner.

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

REASONS

Preliminary matters

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

Appellant	The Department for Education.
Commissioner:	The Information Commissioner.
Requester:	Staploe Education Trust.
Decision Notice:	The Decision Notice of the Information Commissioner dated 7 June 2022, reference IC-117253-J6C0.
DPA:	Data Protection Act 2018.
FOIA:	The Freedom of Information Act 2000.
Legitimate Interests Basis:	The basis for lawful processing of personal data specified in Article 6(1)(f) of the UK GDPR, as set out in paragraph 41..

Legitimate Interests Test:	The three-part test for establishing the Legitimate Interests Basis, referred to in paragraph 47..
Project:	The St Bede's Free School Project which was the subject of the Request.
Public Interest Test:	The test as to whether, in all the circumstances of the case, the public interest in maintaining an exemption outweighs the public interest in disclosing the information, pursuant to section 2(2)(b) of FOIA (set out in paragraph 30.).
Request:	The request for information made by the Requester dated 12 November 2020, more particularly described in paragraphs 9. and 10..
Requested Information:	The information which was requested by way of the Request.
UK GDPR:	The General Data Protection Regulation (EU) 2016/679, as it forms part of domestic law in the United Kingdom by virtue of section 3 of the European Union (Withdrawal) Act 2018.

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

3. We considered whether a closed annex to this decision was required. We concluded that the reasons we have given in this decision, including those alluded to in support of our reasoning, will be sufficiently apparent to the parties by reference to the closed material which is already in their position, such that a separate closed annex is not necessary. If there is an appeal in respect of this decision (or permission to appeal is sought), any necessary closed material can, of course, be provided to the Upper Tribunal.

Introduction

4. This is an appeal against the Decision Notice, which (in summary[1]) held that the Appellant should disclose the Requested Information, subject to certain redactions. The Decision Notice also held that the Appellant had breached section 10 of FOIA by not responding to the Request within twenty working days.

Mode of Hearing

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

6. The Appellant was represented by Robert Cohen of Counsel and in attendance was Gemma Benson of the Government Legal Department. Also attending was the Appellant's witness (until after their evidence was concluded). The Commissioner was represented by Clíodhna Kelleher of Counsel and there were no other attendees on behalf of the Commissioner.

7. During the hearing, there were some occasional minor interruptions, including related to connection problems, but in each instance the interruptions were very short and the proceedings were briefly paused. The Tribunal was satisfied that no participant had missed

1 See paragraphs 16. and 17. for more detail.

anything as a result of these interruptions and that there was no adverse impact on the proceedings. There were no other issues with the hearing.

Background to the appeal

8. The background to this appeal is as follows.

The Request

9. On 12 November 2020, the Requester wrote to the Appellant in the following terms, in respect of the Project:

"*Dear Baroness Berridge,*

We write further to the letter you sent to Wendi Ogle-Welbourn, Executive Director: Children, Families and Adults Services, Cambridgeshire, dated 12 October, concerning your decision that the project to open St Bede's Inter-Church Free School in Soham should continue towards an opening date of September 2023. The Staploe Education Trust operates Soham Village College which will be directly impacted by this decision.

Your letter acknowledges that there has been concern raised about this proposal. Your letter suggests that you have reviewed the risks involved with this project and that you are aware of 'the anxiety around basic need expressed by ***some*** *of the existing local schools'. In fact, we invite you to acknowledge that concern was expressed by* ***all*** *the local secondary schools and correspondence with your officials was signed by five local Multi Academy Trusts. You have perhaps misunderstood the unanimity of these concerns.* [original emphasis]

No one in the Department for Education over the last two years has addressed these concerns. There is a weight of correspondence and argument in opposition to this project: your letter gives no reassurance that these concerns have been heard or understood.

It is clearly important that your decision to invest considerable public funds in this project is transparent and perceived to be rational. In the interests of good governance, and mindful of your public duty to the whole school system, we are therefore writing to request that you share your risk assessments and the Equality Impact Assessment you have undertaken (this is also a formal Freedom of Information Act request).

The Staploe Education Trust is particularly interested in your evaluation of impact upon Soham Village College. We should like to point you to the concerns first raised in a letter to Ian Casey on 17 September 2018, below, to which no response was ever received. The scope of our concerns remains unaltered. We should be grateful if you would share your full assessment of impact upon community cohesion and the particular contribution of the Staploe Education Trust to the community of Soham. How do you expect the risks to the community, and to a very good school already at the heart of that community, to be mitigated?

With regard to your letter to Wendi Ogle-Welbourn, you acknowledge that your decision was 'finely balanced'. You give three reasons for your decision.
1. A basic need for school places (which you acknowledge are not actually needed in 2023)
2. A belief in the capacity of a St Bede's free school to raise educational standards at Soham Village College.
3. The desire to give parents more choice, particularly a faith choice.".

10. The letter also made additional points, including setting out some views regarding those three reasons and other issues and it requested certain information in respect of them. We comment further on some of these below (paragraph 95. onwards). The letter concluded: "*We look forward to receiving the evidence which has underpinned your decision and sight of all the necessary risk assessments. Please treat the above requests for information as requests under the Freedom of Information Act.*".

The Appellant's reply and subsequent review

11. The Appellant responded to the Request by email dated 9 February 2021[2]. The Appellant confirmed that it held the Requested Information. However, it stated that the exemption in section 36 of FOIA (prejudice to effective conduct of public affairs) was engaged and that it would need more time to provide a full response to the Request, due to the need to consider the application of the Public Interest Test in respect of that exemption.

12. The Appellant subsequently contacted the Requester by email dated 4 March 2021[3]. In this instance, the Appellant stated that it held only some of the Requested Information and addressed specific aspects of the Request. The Appellant provided some of the Requested Information to the Requester within that email and by referring to sources of relevant information. The Appellant refused to provide other aspects of the Requested Information, citing specific subsections of section 36(2) of FOIA (prejudice to effective conduct of public affairs) and stating that a qualified person (namely, a Minister) had given her reasonable opinion for the purposes of that section. The email also referred to the Public Interest Test which the Appellant carried out in connection with maintaining that exemption, setting out its analysis and conclusions in respect of that test.

13. The Requester, through its solicitors (Stone King LLP), wrote to the Appellant[4] in response to the Appellant's email 4 March 2021. The letter complained about the Appellant's responses to the Request[5], referring to the timeliness of the response and the application of the exemptions cited by the Appellant. Concerns were raised about the application of the exemptions by the Appellant, including with respect to the information provided in support of those exemptions on the application of the Public Interest Test and various legal points were made in support of those concerns. The letter also complained about issues relating to the provision of impact assessments and consultation obligations under the Academies Act 2010, as well as referring to other FOIA requests which were said to had been made by other multi-academy trusts relating to the Project.

14. Following an internal review, the Appellant wrote to the Requester's solicitors on 25 March 2021, maintaining its views in its email dated 4 March 2021. In addition, the Appellant stated that some of the Requested Information was being withheld pursuant to section 42 of FOIA (legal professional privilege) and referring to the Public Interest Test which it carried out in connection with maintaining that exemption.

15. The Requester (again, through its solicitors), contacted the Commissioner on 12 July 2021 to complain about the Appellant's responses to the Request. The Requester raised the issues referred to in the earlier letter of complaint to the Appellant and stated that the Appellant had not responded to the specific legal points raised in that letter.

The Decision Notice

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

    a. sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA (prejudice to effective conduct of public affairs) were engaged in respect of the Requested Information but that the public interest favoured disclosure;

    b. section 42 of FOIA (legal professional privilege) was engaged in respect of the

2 The Appellant's email stated that the Request was received on 12 January (2021). No comment was made in this email as to the date of the Request (12 November 2020) or any previous correspondence from the Requester.
3 In this email, the Appellant referred to its understanding that earlier letters had been sent by the Requester in November and December (2020) but stated that there was no record of that correspondence having been received. The email erroneously referred to the Request being received on 12 January 2020 (as opposed to 12 January 2021).
4 This letter was undated; the Appellant's response to it stated that it was received on 28 April (2021).
5 The letter erroneously referred to the Appellant's response to the Request as being dated 5 March 2021 (as opposed to 4 March 2021).

Requested Information but that the public interest favoured disclosure;

c. the Appellant was entitled to withhold the personal information of officials below the grade of deputy director pursuant to section 40(2) of FOIA (personal information);

d. the Appellant had breached section 10 of FOIA by not responding to the Request within twenty working days.

17. The Decision Notice required the Appellant to disclose the Requested Information which engaged sections 36(2)(b)(i), 36(2)(b)(ii) and 42 of FOIA (a copy of all of the withheld information), subject to redactions in respect of information which engaged section 40(2) of FOIA.

The appeal

Grounds of appeal

18. The Appellant's grounds of appeal were essentially as follows:

a. the Appellant held some information about the Project falling within the scope of the Request;

b. the Commissioner correctly concluded that sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c) and 42 of FOIA were engaged;

c. however, the Commissioner was wrong to conclude that the public interest militated in favour of disclosure (in respect of sections 36 and 42 of FOIA);

d. in particular, the very contentious nature of the Project (and the inevitability of legal challenge to aspects of it) provided an overwhelming public interest in withholding the information.

19. Various submissions were made by the Appellant in support of its appeal. The material points were addressed by Counsel at the hearing on behalf of the Appellant and we refer to the relevant submissions below.

The Commissioner's response

20. In response to the appeal, the Commissioner maintained the position set out in the Decision Notice – namely (so far as is material for the purposes of the appeal) that the withheld information does engage sections 36, 42 and 40 of FOIA but that the public interest nonetheless favours disclosure in respect of the information withheld under sections 36 and 42 of FOIA.

21. The Commissioner's view was that the issue for the Tribunal to determine in the appeal was whether the Commissioner was correct to conclude that the public interest militated in favour of disclosure of the information in respect of sections 36 and 42 of FOIA.

22. The material points made by the Commissioner in his response were addressed by Counsel at the hearing on behalf of the Commissioner and we refer to the relevant submissions below.

The Appellant's reply

23. As part of its reply to the Commissioner's response, the Appellant provided an update on issues relating to the Project, explaining that (amongst other things) it had since been decided that the Project would be cancelled in its entirety and that the proposed free school, St Bede's, would not be built at any location.

24. Again, the further material submissions made by the Appellant in reply to the Commissioner's

response were also put forward by Counsel at the hearing and have been referred to below.

The Tribunal's powers and role

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

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

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

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

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

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

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

The law

The statutory framework

General principles

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

"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.".

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

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

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

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

provides:

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

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

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

32. Section 2(3) of FOIA explicitly lists which exemptions in Part II of FOIA are absolute. Pursuant to that section, no other exemptions are absolute. Section 36 is referred in that list, but only applies so far as relating to information held by the House of Commons or the House of Lords. Section 40(2) is stated as being an absolute exemption in respect of cases "where the first condition referred to in that subsection is satisfied". Section 42 is not included in that list.

33. Accordingly, in summary, the position regarding the relevant exemptions for the purposes of this appeal is as follows:

    a. the applicable exemptions in sections 36 and 42 of FOIA are both qualified exemptions, so that the Public Interest Test has to be applied, even if those sections are engaged; and

    b. section 40(2) of FOIA is an absolute exemption only in cases where a specific condition is satisfied (as referred to below) - otherwise the exemption is subject to the Public Interest Test.

<u>*Section 36*</u>

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

"*(1) This section applies to—*

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

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

…(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.

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

(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…"

35. In summary, therefore, for the purposes of this appeal, the above provisions of section 36 of FOIA provide that (save as noted in paragraph 38. and subject to the Public Interest Test) the Requested Information is exempt if, in the reasonable opinion of a Minister of the Crown:

    a. disclosure of it would, or would be likely to, inhibit either: (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation; or

    b. disclosure of it would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

36. Sections 36(2)(b) and 36(2)(c) of FOIA both use terms to the effect 'would or would be likely to'. This means that the matter in question is more probable than not or that there is a real and significant risk of it happening. If a public authority is to rely on either section, it must show that there is some causative link between the potential disclosure of the relevant information and (respectively):

    a. the inhibition of the free and frank provision of advice or exchange of views for the purposes of deliberation; or

    b. the prejudice to the effective conduct of public affairs.

37. The public authority must also show that the inhibition or prejudice (as applicable) is real, actual or of substance. It must also relate to the interests protected by the exemption.

38. Section 36(4) of FOIA has the effect of removing the need for the reasonable opinion of a qualified person in order to engage the exemption under section 36 of FOIA insofar as statistical information is concerned.

<u>*Section 40*</u>

39. So far as is relevant for the purposes of this appeal, section 40 of FOIA provides:

    "*(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*

    (2) Any information to which a request for information relates is also exempt information if—

    (a) it constitutes personal data which does not fall within subsection (1), and

    (b) the first, second or third condition below is satisfied.

    (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—

    (a) would contravene any of the data protection principles…".

40. Section 40(7) of FOIA sets out applicable definitions for the purposes of section 40, by reference to other legislation, the applicable parts of which are as follows:

    a. section 3(2) of the DPA defines "*personal data*" as "*any information relating to an identified or identifiable living individual*". The "*processing*" of such information includes "*disclosure by transmission, dissemination or otherwise making available*" (section 3(4)(d) of the DPA) and so includes disclosure under FOIA;

    b. the "*data protection principles*" are those set out in Article 5(1) of the UK GDPR, and

section 34(1) of the DPA. The first data protection principle under Article 5(1)(a) of the UK GDPR is that personal data shall be: "*processed lawfully, fairly and in a transparent manner in relation to the data subject*"; and

c. a "*data subject*" is defined in section 3 of the DPA and means "*the identified or identifiable living individual to whom personal data relates*".

41. To be lawful, the processing of personal data must meet one of the bases for lawful processing set out in Article 6(1) of the UK GDPR. One such basis is where "*processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child*" (Article 6(1)(f) of the UK GDPR).

42. Article 6(1) of the UK GDPR goes on to include an exception to the Legitimate Interests Basis, stating that it does not apply to processing carried out by public authorities in the performance of their tasks. However, section 40(8) of FOIA provides that such exception is to be omitted for the purposes of section 40 of FOIA, meaning that the Legitimate Interests Basis can be taken into account in determining whether the first data protection principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information by a public authority under FOIA.

43. The first recital to the UK GDPR is also relevant. This provides: "*The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (the 'Charter') and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her.*". The second recital to the UK GDPR also includes the following: "*The principles of, and rules on the protection of natural persons with regard to the processing of their personal data should, whatever their nationality or residence, respect their fundamental rights and freedoms, in particular their right to the protection of personal data.*".

<u>*Section 42*</u>

44. So far as is relevant for the purposes of this appeal, section 42 of FOIA provides:

"(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

Relevant case law

<u>*Section 36*</u>

45. Whether the exemption under section 36 of FOIA is engaged depends on the 'reasonable opinion' of the qualified person (section 36(2) of FOIA, as set out above). This means substantively reasonable and not procedurally reasonable: *Information Commissioner v Malnick and ACOBA*[6].

46. In relation to 'chilling effect' arguments, the following paragraphs from the Upper Tribunal's decision in the case of *Davies v Information Commissioner and The Cabinet Office*[7] provide a useful summary of the relevant case law:

"*There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of public affairs are to be treated with some caution. In Department for Education and Skills v Information*

6 [2018] UKUT 72 (AAC), paragraphs 51-56.
7 [2019] UKUT 185 (AAC) , paragraphs 25-30.

Commissioner and Evening Standard EA/2006/0006, the First-tier Tribunal commented at [75(vii)] as follows:

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

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

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

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

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

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

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

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

<u>*Section 40(2)*</u>

47. The Legitimate Interests Basis is the only basis for lawful processing listed in Article 6(1) of the UK GDPR which contains a built-in balance between the rights of a data subject and the need to process the personal data in question. There is a test which must be undertaken in order to determine whether or not the Legitimate Interests Basis can apply in any relevant scenario. This test involves consideration of three questions, as set out by Lady Hale in the Supreme Court's judgment in the case of *South Lanarkshire Council v Scottish Information Commissioner*[8]:

"(i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?

(ii) Is the processing involved necessary for the purposes of those interests?

(iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?".

48. The wording of question (iii) is taken from the Data Protection Act 1998, which has been superseded by the DPA and the UK GDPR. Accordingly, that question should now reflect the wording used in the UK GDPR such that the third question should now be: '*Are those interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?*'. This last question of the Legitimate Interests Test specifically addresses the balance between the rights of a data subject and the need to process the personal data in question.

49. The approach set out above in the *South Lanarkshire* case was subsequently reiterated in the Upper Tribunal in the case of *Goldsmith International Business School v Information Commissioner and Home Office* ([2014] UKAT 563).

50. We should make it clear that the relevant test for these purposes is not the Public Interest Test but rather the Legitimate Interests Test – and that these tests are different. As explained by Upper Tribunal Judge Kate Markus QC (now KC) in the case of *Information Commissioner v*

8 [2013] UKSC 55, paragraph 18

Halpin[9]:

"At paragraph 52 of its decision the FTT treated the approach to disclosure under FOIA and that under the DPA as being the same. This is incorrect. The observations of Lord Rodger of Earlsferry in Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550 at [68], which the FTT relied upon, do not support any such equivalence. In the same case at [7] Lord Hope said of the DPA and the EU Directive which it implemented, "the guiding principle is the protection of ...[the] right to privacy with respect to the processing of personal data". FOIA creates a general right to information subject to the exemptions in section 2. Section 40(2) creates an absolute exemption for information which may not be disclosed under the DPA, and under the DPA personal data is protected unless disclosure is justified. Upper Tribunal Judge Wikeley explained the position as follows in Cox v Information Commissioner and Home Office [2018] UKUT 119 (AAC) at [42]:

> *"...the balancing process in the application of the Goldsmith questions "is different from the balance that has to be applied under, for example, section 2(1)(b) of FOIA" (see GR-N v Information Commissioner and Nursing and Midwifery Council [2015] UKUT 449 (AAC) at paragraph 19). Furthermore FOIA stipulates that the section 40(2) exemption applies if disclosure would contravene the data protection principles enshrined in the DPA, so it is the DPA regime which must be applied. There is no obvious reason why the general transparency values underpinning FOIA should automatically create a legitimate interest in disclosure under the DPA.""*

<u>Section 42</u>

51. In respect of legal professional privilege, the House of Lords established, in the case of *Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)*[10], the relevant principles which must apply if legal professional privilege attaches to any particular material:

    a. the material must be between a qualified lawyer acting in their professional capacity and a client;

    b. it must be created with the sole or dominant purpose of obtaining or providing legal advice; and

    c. it must be confidential.

52. A useful summary of relevant case law regarding the application of the legal professional privilege exemption in section 42 of FOIA is set out in the Upper Tribunal's decision in the case of *DCLG v The Information Commissioner & WR*[11] (albeit a case regarding the application of regulation 12(5)(b) of the Environmental Information Regulations 2004), as follows:

    "*The development of the doctrine of legal advice privilege, and of the rationale for it, is traced in detail in the speech of Lord Taylor of Gosforth CJ in Reg v Derby Magistrates Court, Ex p. B, [1996] AC 487, and then summarised by him as follows at p.507D:*

    > *"The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."*

9 [2019] UKUT 29, paragraph 29
10 [2004] UKHL 48
11 [2012] UKUT 103 (AAC), paragraphs 37-40 and 42-46

Lord Taylor went on (at p. 508C) to reject a submission that, by analogy with the doctrine of public interest immunity, there might be occasions, if only by way of rare exception, in which the rule should yield to some other consideration of even greater importance:

> *"But the drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had "any recognisable interest" in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined."*

As Lord Lloyd said in the Derby case (at p.509D):

> *"….the courts have for very many years regarded legal professional privilege as the predominant public interest. A balancing exercise is not required in individual cases, because the balance must always come down in favour of upholding the privilege, unless, of course, the privilege has been waived."*

As far as we are aware it has never been judicially doubted that the same principle applies in relation to advice sought or obtained by a public authority in relation to its public law rights and obligations. Indeed, in the Three Rivers case Lord Scott said, at [36]:

> *"It is clear …… that …. legal advice privilege must cover also advice and assistance in relation to public law rights, liabilities and obligations."*

… Section 42 of FOIA contains a qualified exemption for "information in respect of which a claim to legal professional privilege could be maintained in legal proceedings". In DBERR v IC & O'Brien [2009] EWHC 164 (QB) Wyn Williams J, on an appeal (which at that time lay to the High Court) from the Information Tribunal, concluded at para. [39] that in previous decisions under s.42 the Information Tribunal had taken the correct approach to the public interest balancing exercise. That approach had been summarised in Rosenbaum (EA/2008/0035/ 4.11.2008), in a passage approved by Wyn Williams J, as follows:

> *"……the Tribunal does not agree with Mr Rosenbaum that LPP merits only "some weight" ……. From the cases referred to above, this Tribunal is satisfied that LPP has an in-built weight derived from its historical importance, it is a greater weight than inherent in the other exemptions to which the balancing test applies, but it can be countered by equally weighty arguments in favour of disclosure. If the scales are equal disclosure must take place."*

Wyn Williams J. went on at [53] to hold that

> *"the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least."*

In other words, although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption.

Mr Bates accepted that the weight which should properly be given to the exemption in any event, by reason of the risk that disclosure would weaken the confidence of public bodies and their advisers in the efficacy of LPP, may vary from case to case. If, for example, the requested information is very old, or relates to matters no longer current, a disclosure may damage that confidence to a lesser extent than if the information was recent, or relates to

matters still current. We consider that he was right so to accept.

The jurisprudence of the FTT further indicates that the factors in favour of maintaining the exemption are not necessarily limited to the general one just indicated, but may include the effect which disclosure would have in the individual case. For example, if the dispute to which the advice relates is still live at the time of the request, it may be considered unfair that the requester should have the advantage of access to the authority's advice, without affording the authority the same advantage: West EA/2010/0120 (15 October 2010), at [13(5)]."

53. The Upper Tribunal, in the case of *Corderoy and Ahmed v Information Commissioner, Attorney-General and Cabinet Office*[12], further emphasised that the exemption in section 42 of FOIA is not a blanket exemption:

"*The powerful public interest against disclosure … is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour of disclosure if the exemption is to apply. However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute. …*

The importance of the issue and the public interest in the issue works both ways because it supports the need for frankness and confidentiality between client and lawyer on the one hand and the arguments in favour of transparency and fully informed debate on the other".

54. The approach in the *DBERR* case referred to above was restated and applied by the Upper Tribunal more recently in the case of *Robin Callender Smith v Information Commissioner and the Crown Prosecution Service*[13]. The Upper Tribunal also echoed the points made in the *DCLG* and *Corderoy* cases cited above that the exemption in section 42 of FOIA is not a blanket exemption.

55. In essence, therefore, there is a strong element of public interest in-built into legal professional privilege (and thus in maintaining the exemption at section 42 of FOIA), but it is nevertheless still a qualified exemption and must not be treated as an absolute one. If a public authority is to rely on this exemption then it must show that the public interest in maintaining the exemption outweighs the public interest in disclosure.

<u>*The Public Interest Test*</u>

56. Regarding the question of timing in respect of the assessment of the Public Interest Test, in the case of *Montague v The Information Commissioner and the Department for International Trade*[14], the Upper Trubunal stated:

"*The second issue* [in the Montague case] *is the question of whether information that is disclosed after a public authority's decision on a request (for example, during the Commissioner's investigation, in the course of First-tier Tribunal proceedings or as a result of a Tribunal's decision) should be treated as in the public domain for the purpose of weighing the public interest in disclosure of any remaining requested information ("the Public Interest Timing Issue"). Included within this issue is whether a public authority's decision on a request includes any later decision on review by it of its initial decision refusing the request.*

As to the Public Interest Timing Issue, we conclude it is to be judged at the time the public authority makes its decision on the request which has been made to it and that decision making time does not include any later decision made by the public authority reviewing a refusal decision it has made on the request.".

12 [2017] UKUT 495 (AA, paragraphs 68 and 76
13 [2022] UKUT 60 (AAC)
14 [2022] UKUT 104 (AAC), paragraphs 3 and 5

57. That statement reflected the position previously confirmed by the Supreme Court in the case of *R(Evans) v HM Attorney General*[15] that the balancing of the public interest factors in favour and against disclosure falls to be judged "*as at the date of the original refusal*".

58. Similarly, the Upper Tribunal stated in the case of *All Party Parliamentary Extraordinary Rendition (APPGER) v The Information Commissioner and Foreign and Commonwealth Office*:[16]

"*In other cases, and this is an example, there are clearly disadvantages in the Commissioner and then the FTT and then further appellate tribunals and courts being faced with a moving target on public interest issues. This is particularly so when one remembers that the trigger to the FOIA jurisdiction is a request to a public authority holding information. …it seems to us that Parliament would have intended that the requester should make a further request if he wished to rely on changes over time to the public interest factors.*".

59. The *APPGER* case was followed by the Upper Tribunal in the case of *Maurizi v The Information Commissioner and The Crown Prosecution Service*[17]. The above quote from the *APPGER* case was also cited with approval by the Upper Tribunal in the case of *Dr Sarah Myhill v The Information Commissioner and the General Medical Council*[18], stating:

"*Events post-dating the date at which the relevant balancing exercise falls to be conducted are irrelevant. If it was said… that circumstances had changed materially following the [public authority's] refusal of the request, the proper course was not to introduce that new evidence in the course of an existing appeal*".

60. Where the public interests in favour of disclosure and against disclosure are evenly balanced, then the information ought to be disclosed. As explained by the Court of Appeal in the case of *Department of Health v Information Commissioner & Simon Lewis*[19]:

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

The hearing and evidence

61. The Tribunal read and took account of an open bundle of evidence and pleadings. The Tribunal also read and took account of a closed bundle. The closed bundle contained the withheld material and additionally contained some unredacted material which had been redacted in the open bundle. The Tribunal was also provided with a separate bundle of case law authorities from the Appellant prior to the hearing.

62. We heard evidence from a witness on behalf of the Appellant in addition to a written witness statement provided by them which was included within the open and closed bundles. The witness's role was that of (interim) Deputy Director and a member of the senior leadership team in the Regional Director's Office for the East of England. To avoid identifying them personally in this decision, we refer to them just as "the witness" and we mean no disrespect in doing so.

15 [2015] UKSC 21, [2015] 1 AC 1787 (relevant parts of which are set out in paragraph 54 of the *Montague* decision).
16 [2015] UKUT 377 (AAC), paragraph 56
17 [2019] UKUT 262 (AAC)
18 [2022] UKUT 207 (AAC), paragraph 47
19 [2017] EWCA Civ 374, paragraph 46.

63. We also read and took account of skeleton arguments from the Appellant. We heard oral submissions from Mr Cohen on behalf of the Appellant and from Ms Kelleher on behalf of the Commissioner.

64. As only the parties and their representatives attended the hearing (there were no third party observers), the parties agreed with the Tribunal that there was no need to hold a separate 'closed' session; therefore materials in both open and closed format were considered throughout the hearing.

The qualified person's opinion

65. The qualified person (Minister) in the current case was Baroness Berridge. Her opinion was provided in response to an internal submission to her (dated 8 February 2020) which recommended that she confirm that, in her reasonable opinion, all of the Requested Information was exempt. The submission set out details of the relevant exemptions under section 36 of FOIA and certain arguments for and against disclosure for the purposes of the Public Interest Test. The opinion itself (signed by Baroness Berridge) merely stated "*I confirm that, in my reasonable opinion as a qualified person, disclosure of the information under the Freedom of Information Act 2000 would be likely to have the effect set out in section 36 (2)(b)(i), (ii) and 36(2)(c) of that Act.*".

66. We comment below on that submission but, in essence, Baroness Berridge provided her opinion based on its content, which included issues frequently described as 'safe space' and 'chilling effect' arguments.

The Appellant's witness evidence

67. Various points were addressed in the witness's written witness statement. Relevant material issues are referred to below, in the context of the witness's oral evidence.

68. The witness's evidence was given in the capacity of an (interim) Deputy Director and a member of the senior leadership team in the Appellant's Regional Director's Office for the East of England. They explained that the team works across eleven local authority areas and is responsible for (amongst other things): working on the academies and free schools programmes, intervening in inadequate schools and academies to find appropriate improvement solutions, and supporting local authorities to deliver high quality children's social care and provision for children and young people with special education needs or disabilities.

69. The witness stated that their present role began in September 2022 and prior to that they worked in the Appellant's transformation team, working on a change project relating to reorganisation of the Appellant's structure. The witness confirmed that they were not part of the team involved in the Project at the time of the Request. In respect of their witness statement, the witness stated that they had spoken to colleagues who were both directly involved in delivering the Project and in responding to the Request, as well as colleagues involved in developing the free schools policy.

70. The witness confirmed that (as referred to in paragraph 23.) the Project was not proceeding and that the proposed free school was not going to open.

71. The witness was taken to paragraph 31 of their witness statement, in which their referred to officials being aware of previous FOIA decisions when discussing new projects and a concern about the chilling effect on future discussions. They confirmed that everyone was aware that records may be subject to requests under FOIA. They were questioned about the impact this might have and it was put to them that there was still some frank information within the withheld material. They considered that it was a "tricky balance" and there was an assumption that there would be some applicable exemption which could be relied on in order to withhold information from release. In essence, their view was that officials would want

ministers to have the full picture in respect of relevant projects but would also want to rely on some exemptions to releasing the information under FOIA, as this could have an effect on future information.

72. The witness gave evidence in respect of the free schools application process and the nature of the information relevant to that, including what information was in the public domain and what had been communicated internally by the Appellant.

73. The witness was questioned about the Appellant's expectations in respect of the proposed site for the school in connection with the Project and the change in the proposed site. They explained that not much information was held about the site, but that there was a concern that there would not be provision for enough places at the first identified site and so an alternative site for the same provider was looked at. They explained that there is a 'partnership' between the proposer of a free school project and the local authority, which may then work with the Appellant if another possible site needed to be identified.

74. The witness was asked about information in the bundles which appeared to suggest that the alternative site near Soham had been purchased. They thought that a deposit may have been paid but thought that no further information was held in connection with this or any exchange of contracts relating to the site. The witness explained that an arms-length body was involved in deals for securing land but that no documentation had been seen by the witness in this regard and they did not know whether that third party held any relevant records. They said that it may be possible that any deposit paid to secure land may have been lost.

75. In respect of the part of the Request relating to mitigation of the risks of opening a school, the witness considered that no other risk assessment had been undertaken in respect of that particular issue other than an 'impact assessment'. As that 'impact assessment' had been provided, the witness considered that this part of the Request had been responded to.

76. In respect of the part of the Request asking for evidence underpinning the Appellant's belief that opening the free school would raise educational standards, the witness accepted that that may not have been directly identified in the withheld information. They considered that, as the Project's proposer was one of the best performing schools, then it was a factor which would help stipulate good provision in the area and they thought that the request for evidence was addressed by the fact that the proposer was an outstanding school. However, they accepted that there was no evidence to support this in respect of this specific school, rather just a belief based on the academies programme generally.

77. The witness was questioned regarding references in the bundle which appeared to suggest that other information (beyond the information in the bundles) may be held relating to the request. In some instances, they felt that it was just the way things were worded and they stated that they were not aware of any other information.

78. The witness confirmed that even once the decision had been made that the Project was not proceeding, reports may still be provided to the Minister and additional advice would be provided to the Minister in connection with that decision. They explained that there was no expectation of a response from the Minister when a document was provided for the Minister 'to note', but they may do so, including if they objected to that decision. They were not sure whether or not any response had been received.

79. With reference to the spreadsheet extract contained within the bundles, the witness explained that they did not think there were any other documents and that this spreadsheet summarised information from various sources. They said that the 'impact assessment' was largely based on the Appellant's projected demand for school places but other criteria were also relevant.

80. In respect of the routine publishing of information about mainstream free schools, referred to in their witness statement, the witness stated that this does not happen annually. They explained that the publication does not always happen straight away; some are sought to be

published soon after the school has opened but several can be done at the same time. They did not know when information would be published if a free school project had been abandoned.

81. The witness was asked about an annexed 'timeline of events' comprising part of the withheld information, which included a list of meetings. They were unable to confirm whether or not this was a comprehensive list of all meetings or just certain 'formal' or 'key' meetings. They accepted the possibility that there may be other meetings that were not referred to.

82. The witness confirmed that another annex comprising parts of the withheld information was entirely statistical. They said that data in this form would not be in the public domain, but that this was taken from local authority data which was in the public domain. They also confirmed that a third annex to the withheld information (comprising a comparison of certain performance data for existing secondary school provision) was in the public domain, with some being available on the gov.uk website.

83. The witness was unable to give some specific examples in support of the 'chilling effect' arguments which had been cited by the Appellant in respect of its arguments against disclosure of the Requested Information. They stated that they had not worked long enough in the regional teams to be able to give such examples, but commented that the issue of free schools was quite controversial. However, they accepted that information held regarding the knowledge and opinions of the local authority were key to the 'chilling effect' arguments.

84. The witness was asked about the seniority of people putting the relevant information together. They explained that it was largely undertaken by middle management, with support from caseworkers who were overseen by team leaders. It was signed off at director level. When asked why, in connection with the Appellant's 'chilling effect' arguments, senior people may be inhibited, the witness explained that it was the impact of ongoing relationships with people in the sector. They stated that there were around ten thousand academies and that some people were responsible for a large section of the academies, including day-to-day interaction. Going forward, there were issues regarding the need for new places and ministers would want information about what was going on locally relating to the educational system. Essentially, the concerns were that the local relationships and free dissemination of information would be adversely impacted if information such as that comprising the withheld information were to be disclosed.

85. Elaborating on the comments in their witness statement, the witness explained that there was a need for a 'safe space' because of the controversial topics that may be discussed with local authorities and multi-academy trusts to maintain the highest standards of educational provision. They accepted that a safe space was not 'critical' but felt that it helps build relationships and trust and they considered that the absence of a 'safe space' would make discussions more difficult. They accepted that parties to those discussions would know about potential requests under FOIA for information relating to those discussions, but they stated but they did not have this at the forefront of their minds.

86. The witness was asked about some of the specific comments contained in the withheld information which had been cited in their (closed) witness statement in support of the Appellant's arguments that the information should not be disclosed. They accepted that there might be a public interest in the information in question, but stated that the concern was more about the impact which that disclosure might have. In respect of another specific comment contained in the withheld information, they did not know where that comment had come from, stating that it was 'before their time', but they considered that it may have been relating to a planning application.

87. Asked about why the Project was controversial, the witness stated that putting a school in a particular location was an issue, as well as what the government takes into account. They commented that free schools can be seen as a disruptor of local educational provision, albeit

that was not the intention in respect of any free school. The witness also explained that the controversy can sometimes derive from the general community, perhaps because of ideological views about matters such as educational provision.

88. Regarding the withheld information in respect of which the legal professional privilege exemption (section 42 of FOIA) was claimed, the witness believed that the relevant information was copied and pasted, by the delivery officer, from the actual legal advice given. They explained which aspects of the relevant information comprised the actual legal advice provided by the Appellant's Legal Advisor's Office. They explained the Appellant's concerns about the potential impact if that information was made public, having regard to the specific nature of the advice in question, which was felt could adversely affect not only the Project but other initiatives.

The Appellant's Submissions

89. Whilst acknowledging all of the specific points made, the material submissions made by Mr Cohen on behalf of the Appellant were essentially as follows:

a. The original exchange of correspondence was not originally understood as a request for information under FOIA (although it was accepted that it was indeed such a request); many points made in the request letter appeared to have a rhetorical or argumentative function. Paragraph 10 of the Decision Notice only set out part of the request; the only meaningful request was in the latter part of the letter. The Appellant's focus had been the references to the risk assessments and the 'Equality Impact' assessments and it was on that basis that the Request was responded to (and the Decision Notice made).

b. Some of the requested information was now in the public domain. There was no question regarding the disclosure of certain information which was in the public domain, but this was not the case for the remainder of the withheld information.

c. The parties were largely agreed on the legal framework. The Commissioner had accepted the reasonable opinion of the qualified person. The issues were the application of the Public Interest Test and whether the public interest favoured disclosure of the Requested Information.

d. Whilst the Project had since been abandoned, at the relevant time there were issues regarding the developer and the multi-site nature of the Project. The Project was controversial and febrile and allowing too much information into the public domain (within the context of the withheld information) would have been particularly troublesome. It was accepted that there is a public interest in the information but the point is how the prejudice arises and why the public interest favours withholding the information.

e. The officials concerned are closely involved in managing local relationships 'on the ground' – it is key that they are "in the middle of it"; needing to maintain trust is essential. An "honest broker" role is required for these officials, without the concern that shared information would be made publicly available to the world at large.

f. There was a substantial risk of prejudice if the information was to be disclosed - this would hamper the role of a team with a sensitive function, which is why the public interest in transparency is overcome in the current instance. Disclosure would not make the role of the team impossible, but more difficult. The thresholds required for prejudice do not need to render the roles impossible.

g. The Appellant's response to the Request was appropriate. There is a need to apply the exemptions when necessary to prevent undue disclosure of relevant information.

h. The Appellant routinely publishes impact assessments when a new school is open (and at the time of the Request the Appellant thought that the Project was proceeding); there would still have been discussions regarding the Project and an opportunity for the public to be informed. Transparency arguments are therefore met by the existing process; it does not follow that disclosure needs to be made under FOIA.

i. The fact that the Project was not proceeding did not lower the public interest in maintaining confidentiality and legal privilege of withheld information. On the contrary, a core feature of the Commissioner's decision that the public interest favoured disclosure of the information was because the Project was ongoing and controversial; the fact that the Project was not proceeding significantly reduced that controversy and consequently the public interest in the information.

j. Disclosure of part of the withheld information would not be appropriate. Amongst other reasons, there were concerns about sentences being disclosed in isolation. There was also a danger that the entire document was less relevant and less helpful if elements were removed and that disclosure of part only of the document could be misleading. (Counsel referred the Tribunal to elements of the withheld information which were cited as examples where these concerns were vindicated.) Ultimately, the document taken as a whole can substantiate the application of the relevant exemptions and the whole of the document falls to be protected.

k. The Commissioner had argued that there is a double-edged aspect to the Appellant's arguments regarding the need for a safe space where a divisive issue is involved, in that the divisiveness of a project may also increase the public interest in disclosure of the relevant information. The Decision Notice states that it is not the role of the Commissioner to consider the appropriateness of the Appellant's decisions, but goes on to state that the Commissioner cannot ignore blatant opposition from the community. It is more nuanced than that; the ideological issues involved give rise to a particular need for a safe space. The Commissioner had given inappropriate weight to the public interest in disclosure where the matters were 'finely balanced'.

l. In respect of the withheld information relating to the legal professional privilege exemption (section 42 of FOIA), the Commissioner had accepted that it was legally privileged information. A draft document was sent to the legal department to complete and the legal advice is included in the final version. There is clear in-built privilege to the legal advice and the Commissioner should have taken this into account to maintain the exemption. (The case of *Robin Callender Smith*, referred to above, was cited in support of the Appellant's position in this regard and Counsel also referred the Tribunal to specific elements of the relevant information which were cited as justifying maintaining the exemption.)

m. It is dangerous to assess the legal privilege exemption by reference to the content of the advice and whether or not that advice is 'common sense' (as suggested by the Commissioner). What appears to be common sense to the Commissioner might not be to a particular client or their prospective opponent. The particular risk of privileged information being released is that it might form one part of a wider tapestry of information as to a dispute. A fragment of legal advice may seem like common sense to the Commissioner but be of far more significance to the parties to a dispute. Moreover, the content in question goes beyond 'common sense'; it raises specific vulnerabilities and areas of concern and was not just generic advice.

n. Essentially, in the context of a febrile dispute, disclosing the legal advice in question would significantly undermine the Appellant's position and could potentially invite a legal challenge. Disclosing the legal advice could also prevent the lawyers giving their legal advice in the future if they considered it could be disclosable and this therefore would also affect the efficiency and independence of the Appellant's decision-making.

o. The 'finely-balanced' view of the Commissioner is erroneous. It is wrong to take the view that in a finely-balanced matter all information should fall to be disclosed in the public interest.

p. In conclusion, the Commissioner's determination that the public interest militated in favour of disclosure was erroneous. It gave insufficient weight to the inbuilt public interest in legally privileged information being withheld, and paid insufficient regard to the need for public officials to have space to discuss controversial proposals.

90. We also note some additional points from the Appellant's reply which are relevant to, or expand on, Mr Cohen's oral submissions:

a. The risk of inhibiting the free and frank provision of advice and the risk of officials being inhibited from seeking legal advice would continue if the information was released, even though the Project was not proceeding. In such circumstances, officials would still consider in the future that a precedent had been set. They would still consider that if discussions about the Project are released then similar discussions in the future are also liable to be released. This is the 'chilling effect' and prejudice identified by the exemptions which the Appellant relied upon.

b. The risk of a 'chilling effect' was actually much higher if the information were released. This is because an official would be likely to take the view that there is a substantial risk of their discussions being revealed in the future, given that the Project was abandoned and therefore there is a reduction of the public interest in releasing the information.

c. There was a particular need for a 'safe space' for public officials to have full and frank discussions where they are discussing "especially divisive" issues. The Commissioner's arguments that the public interest in releasing information could be heightened in respect of a divisive issue or policy are substantially lessened given that the Project was not proceeding, as the controversy surrounding the Project is now in the past.

The Commissioner's Submissions

91. Whilst acknowledging all of the specific points made, the material submissions made by Ms Kelleher on behalf of the Commissioner were essentially as follows:

a. There is a distinction between 'safe space' and 'chilling effect'; the former is required to test theories whilst a particular policy is being developed and once that has been done then there is no longer a need for a safe space. In contrast, 'chilling effect' is inter-temporal and could affect other projects. This is a point which the Commissioner wished to stress.

b. The nub of the issue was that public officials are expected to be impartial and robust when giving advice and partaking in discussions; they should not easily be deterred from expressing their views by the possibility of future disclosure under FOIA. This is profoundly important to the operation of the FOIA scheme. The Appellant's arguments in support of the need for a safe space were too generic. Public officials may feel the glare of public scrutiny but this this what the law expects.

c. Examples cited by the Appellant (referred to in the closed bundle) in support of the reasons to withhold the Requested Information were weak examples[20]. They were not particularly sensitive and they referred to information which is in the public domain (or common sense) and/or were not attributed to any individual, or did not reflect a formal position. There was a difficulty in making the 'chilling effect' argument when relevant extracts are not attributable to anyone; for example, it cannot be said to harm any particular relationship. Moreover, none of the examples supported the argument that

20 The specific examples were cited and analysed by Ms Kelleher in closed session during the hearing and are not cited in this decision.

stakeholders would be inhibited from providing information in the future.

d. No arguments had been advanced as to why the local authority would refuse to work with the Appellant going forward should any of the relevant information be disclosed.

e. The witness referred to the characterisation and role of the Appellant but that was not unique to the Appellant; the same could be said for other government departments and local authorities. This was therefore not specifically very sensitive to the Appellant. Even if those working within the Appellant had to wear different 'hats' with regard to their roles internally and their interactions with outside third parties, this would still all be subject to the application of FOIA.

f. There are various factors in favour of disclosure of the Requested Information[21]. It was not for the Commissioner to wade into the public debate on the relevant issues (and the Commissioner took no sides on it) but they showed the need for transparency. The Appellant's views on a 'chilling effect' had been taken into account but the Commissioner considered that these were outweighed by the need for transparency and openness.

g. The Appellant's arguments, to the effect that where matters are particularly controversial then disclosure of information is arguably more likely to cause prejudice, were incorrect. If public officials particularly feel the glare of publicity, it is because people have an interest in the matters in question. It was accepted that where matters are controversial this may increase the desirability for a 'safe space' but it also increases the need for transparency and increases the public interest.

h. The Appellant's position regarding the possibility of future disclosure of the Requested Information was irrelevant to whether the information should have been disclosed pursuant to FOIA.

i. On the issue of legal professional privilege (section 42 of FOIA), the Commissioner accepted that legal professional privilege is engaged and, contrary to the Appellant's submissions, recognised the strong interest in maintaining legal professional privilege (having also taken into account the specific nature and content of the legal advice in question[22]). However, FOIA provides for that interest to be overridden, in certain circumstances, by the public interest in disclosure of the relevant information. This does not require that the case for disclosure is an exceptional one and section 42 should not be elevated to the status of an absolute exemption (as referred to in the *DBERR* case, cited above).

j. The Appellant had not explained why the content of the legal advice in question would increase the risk of challenge and/or undermine the ability of the Appellant to seek and rely on legal advice in the future. The Commissioner accepted that the balance was very fine in this case, but considered that the public interest nonetheless favoured disclosure of the information for the reasons set out in the Decision Notice.

Discussion and conclusions

Outline of relevant issues

92. The primary issue for the Tribunal to determine in this appeal was essentially whether or not the Decision Notice was in accordance with the law. Accordingly, we needed to determine:

a. whether sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA (prejudice to effective conduct of public affairs) were engaged in respect of the relevant Requested Information;

21 We refer to some of these below in paragraph 122..

22 This was considered and addressed in the closed bundle and in the hearing in closed session.

b. if those sections were engaged, whether the public interest favoured disclosure of the relevant Requested Information;

c. whether section 42 of FOIA (legal professional privilege) was engaged in respect of the relevant Requested Information;

d. if that section was engaged, whether the public interest favoured disclosure of the relevant Requested Information;

e. whether the Appellant was entitled to withhold the personal information of officials below the grade of deputy director pursuant to section 40(2) of FOIA (personal information);

f. whether the Appellant had breached section 10 of FOIA by not responding to the Request within twenty working days.

93. We address each of those points below, after some preliminary points.

Scope of the Request

94. As we have noted, the witness considered that the part of the Request relating to mitigation of the risks of opening a school had been responded to by way of the provision of an 'impact assessment' (with no other risk assessment having been undertaken). As also noted, Mr Cohen had stated that the Appellant's focus had been the references to the risk assessments and the equality impact assessments in the Request and it was on that basis that the Request was responded to (and the Decision Notice made).

95. We set out below relevant extracts of the Request (with emphasis added):

"*We should therefore be grateful if you would share your analysis of basic need for places, and your assessment of the risks to local schools from this proposed new school,* ***including*** *your public sector equality impact assessment.*"

"...we are therefore writing to ***request that you share your risk assessments and the Equality Impact Assessment you have undertaken*** *(this is also a formal Freedom of Information Act request).*

"The Staploe Education Trust is ***particularly interested in your evaluation of impact upon Soham Village College****. We should like to point you to the* ***concerns first raised in a letter to Ian Casey on 17 September 2018, below, to which no response was ever received****. The scope of our concerns remains unaltered. We should be grateful if you would share* ***your full assessment of impact*** *upon community cohesion and the particular contribution of the Staploe Education Trust to the community of Soham.* ***How do you expect the risks to the community, and to a very good school already at the heart of that community, to be mitigated?"***

"*You state that you 'believe opening a free school with an Ofsted rated outstanding provider will help raise standards even further in Soham.' As a rationale for your decision to support opening a free school in Soham, this is a bold statement. We would therefore* ***like to ask for the evidence that underpins your belief***."

"*As one of your cited reasons for deciding to proceed with opening a St Bede's free school in Soham, we should be grateful if you would explain exactly how you believe that St Bede's will be able raise standards at Soham Village College? We* ***would be interested to see evidence of effective school improvement in similar circumstance***."

"*In central Cambridge, an analysis of the St Bede's demographic clearly shows that the majority of parental preference for St Bede's Inter Church School comes from families*

resident in the catchment of secondary schools perceived to be less successful and with a less favourable intake. We would therefore be grateful if you would ***share your analysis of this compelling faith preference, providing evidence*** *of parental preference on the basis of faith, rather than simply a preference (applicable in any context) to have a choice rather than not to have a choice.*"

"Clearly this free school represents a considerable investment of public funds. ***What is the evidence that a 4FE school represents good value for money?*** *Given that the vast majority of children in Soham and its surroundings will not be educated at the new faith free school, how will you justify an £18 million capital project to educate only children whose parents are engaged enough to make such a choice, any choice, about their secondary education.*"

*"****We look forward to receiving the evidence which has underpinned your decision*** *and sight of all the necessary risk assessments."*

96. It is clear from the above that the Requester did require a copy of any applicable risk assessments and equality assessments undertaken by the Appellant. However, it is our view that the scope of the Request was not limited to that. We consider that the Request clearly extended to any information which the Appellant may hold relating to the matters we have emphasised (which are not exhaustive); not just any risk assessments or equality impact assessment which the Appellant may hold. Accordingly, we find that the Request also encompassed any other information which may be held by the Appellant which was referred to in the Request (including any information held by the Appellant which evidenced, or was otherwise relied on or relevant to, the Appellant's belief and reasons stated in the Request). Further, whilst the Appellant stated that it did not have an equality impact assessment, we consider that some of the withheld information was relevant to those parts of the Request. We should perhaps emphasise, however, that FOIA only extends to information which is actually held by a public authority (as opposed to any information which a requester may simply believe or argue should be held).

97. Given the view of the witness and the input of Mr Cohen to which we have referred regarding the scope of the Request and the Appellant's focus in responding to the Request (as well as our consideration of the response itself and the withheld information), it is our view that all applicable parts of the Request may not have been completely considered or responded to. Likewise, the Decision Notice focussed on only part of the Request (paragraph 10 of the Decision Notice). Accordingly, we have concluded that the Commissioner did not consider (or did not adequately consider) other relevant parts of the Request or address whether those other parts of the Request had been properly considered or responded to by the Appellant.

First-tier Tribunal decisions

98. We have considered in our deliberations the decisions of the First-tier Tribunal in the various cases which the parties have referred us to, but we are also mindful that other First-tier Tribunal decisions are not binding on us and, more importantly, each such decision turns on its facts. Our role is to determine the appeal based on its facts and, in that regard, we therefore derived little or no assistance from fact-specific situations dealt with in other First-tier Tribunal decisions.

Were sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA engaged?

99. If section 36 of FOIA is to apply then, pursuant to section 36(1) of FOIA, the information in question must be held by a government department and must not be exempt information by virtue of section 35 of FOIA. It is evident (and not disputed) that relevant information was held by a government department (the Department for Education). Section 35 of FOIA applies to matters such as the formulation or development of government policy and ministerial communications. We are satisfied that the withheld information does not fall within the application of section 35 of FOIA (and this was not alleged or disputed by either of the

parties).

100. As we have noted:

a. the Requested Information is exempt pursuant to the relevant provisions of section 36 of FOIA (subject to the Public Interest Test) if, in the reasonable opinion of a Minister of the Crown:

- disclosure of it would, or would be likely to, inhibit either: (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation; or

- disclosure of it would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs;

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

c. the Minister provided her opinion in response to an internal submission made to her and it was essentially based on 'safe space' and 'chilling effect' arguments.

101. The relevant points set out in that internal submission were as follows (using the same redactions as were applied in the open bundle):

"*There is general public interest in disclosure of some of the information requested because of the need to be more open and transparent in government and promote public accountability. However it is important that disclosing information does not inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation or prejudice the effective conduct of public affairs. We therefore believe the exemptions under Section 36(2)(b)(i)(ii) and 36(2)(c)(i)(ii) apply.*

…the decision to continue with the construction of St Bede's Free School has proven controversial with [redacted] *and a cohort of local trusts, including Staploe Trust (the correspondent). If we disclose the information showing that* [redacted].

The release would in turn allow one or all local Trusts to see confidential matters between [redacted]*, and also confidential advice to you on* [redacted]. *Releasing this information into the public domain would negatively affect*[redacted]

As the process of completing the free school is ongoing, releasing information about the decision making and approval process would make the Trust party to our reasoning for continuing with the project before its completion. This would allow all the local trusts opposing the project to continue objections on specific information and advice set out in the submission.

The exemption is also being requested for an Equalities Assessment carried out internally by the Department regarding the project. It is our policy to withhold Free School Assessments, which include Equalities Assessments, so that Departmental policy teams can provide free and frank advice, as referenced in points i) and ii) of Section 36. Equalities Assessments must also be provided in confidence between Ministers and policy teams. Although there could be a public interest in releasing the Equalities Assessment that you mention, in order to protect the integrity of the above relationships it is necessary to withhold under Section 36 of the Act, again this is to ensure the free and frank provision of advice between Ministers and Departmental policy teams.

The exemption is also being considered for the current impact assessment held by the department. Although there is the potential for releasing, allowing the information into the public domain when the project is still ongoing would compromise the confidentiality of

information provided by the policy team. As the data references most of the schools [redacted]*, there is the risk that those opposing the project will use this as evidence that the project* [redacted]*, and that the department is acknowledging this as fact.*

If the Minister agrees with the recommendation, a public interest test based on the factors outlined here will be carried out. The information that is requested to be withheld is itemised in the table in the annex below.".

102. There was little put forward in that submission by way of arguments in favour of disclosure of the Requested Information. Notwithstanding that, we find that the Minister did provide an opinion which meets the requirements of the relevant provisions of section 36 of FOIA, including that the opinion was a reasonable one which could be held. We formed this view partly based on the content of the submissions put to the Minister, to which we have referred, but we have also had regard to the following observations of the Upper Tribunal in the *Malnick* case:

"*In particular, it is clear that Parliament has chosen to confer responsibility on the QP*[23] *for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice… it is to be afforded a measure of respect.*". [24]

103. Accordingly, we find that all of sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA were engaged in respect of the relevant Requested Information. We also note that this was common ground between the parties. The issue between the parties was that of the Public Interest Test, to which we now turn.

Did the public interest favour disclosure?

104. Having determined that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA were engaged, we now need to consider whether the public interest in maintaining the exemptions in those sections outweighed the public interest in disclosing the information. We remind ourselves that this is to be assessed 'in all the circumstances of the case' as per section 2(2)(b) of FOIA.

105. The main argument of the Appellant in respect of the Public Interest Test was, fundamentally, a 'chilling effect' argument in the sense that the Appellant's concerns are about future behavioural changes of relevant stakeholders in response to the disclosure of the Requested Information and the perceived likelihood of disclosure of similar information in the future. Essentially, the Appellant's case is that disclosure of the Requested Information would risk inhibiting relevant individuals from participating in full and frank discussions (or, in respect of the legal professional privilege issue, the free and frank provision of advice) – and that this is even more important where the issues in question are "especially divisive".

106. We accept that there is a risk of a 'chilling effect' and that this is a relevant factor in assessing the Public Interest Test in this case. In reaching this view, we were assisted by the observations of Charles J in the *Department of Health* case[25] in relation to the approach to deciding whether disclosure is likely to have a chilling effect. We should also note that we agree with the point made by the Commissioner about the distinction between 'safe space' and 'chilling effect' (see limb (a) of paragraph 91.).

107. The Appellant argued that there is a particular need for a 'safe space' for public officials to have full and frank discussions where they are discussing "especially divisive" issues. However, to some extent, we consider that the fact that issues may be "especially divisive"

23 (Qualified Person for the purposes of section 36 of FOIA.)
24 Paragraph 29.
25 Cited by the Upper Tribunal in the *Davies* case; see paragraph 46. above.

could strengthen arguments supporting the public interest favouring the disclosure of the information in question. In that regard, we agree with the view of the Commissioner that the effect of this submission is somewhat 'double-edged'.

108. The Appellant's position was that the Commissioner's arguments on the preceding point were substantially lessened given that that the Project had been abandoned. Thus we found ourselves faced with arguments from the Appellant that there is less public interest in the Project but no diminution in the need to maintain a 'safe space' in the future (for other projects). At the same time, the Appellant's position is that it does not consider that disclosure of the withheld information will never be possible, stating (in its reply to the Commissioner's response) that it is not its position that "*the public permanently deprived of information in respect of a potentially controversial policy*". In this regard, the Appellant considered that the Commissioner did not give any weight (or appropriate weight) to other steps which may be taken to inform the public in the future, when considering the Public Interest Test. The Appellant concluded that it follows that the public interest is lowered if the information will be disclosed in the future and accordingly that the public interest in maintaining the exemption outweighed that of earlier disclosure. In our view that reasoning is flawed, particularly as the Appellant went on to state that such public interest "*may be vindicated in the longer term*".

109. To deal with the point about the Project not proceeding, the assessment of the Public Interest Test (including the relevant factors being taken into account) falls to be judged as at the date of the original refusal by a public authority to disclose information requested under FOIA (as per the cases we cited at paragraphs 56. to 59.). Consequently, the fact that a decision has since been made not to proceed with the Project is not a relevant factor and must be disregarded for the purposes of the Public Interest Test and the decision of the Appellant at the time of refusing the Request (as well as for the purposes of the Appellant's subsequent review of that decision, and the Decision Notice itself).

110. We do, though, consider that the possibility of future disclosure of information which has been requested is a relevant factor in assessing the Public Interest Test (as at the time of the Appellant's refusal of the Request). We comment further on this below.

111. The Appellant also argued that, in respect of matters which are particularly controversial, disclosure of information may be more likely to cause prejudice than in other (less controversial) situations. The Commissioner stated, in his response to the appeal, that it was wrong to approach the question of whether the information ought to be disclosed by asking whether the controversial nature of the information "*override[s] the need for uninhibited discussion*" in respect of it, but rather whether the Appellant had discharged its burden of establishing that a need for uninhibited discussion overrides the interest in disclosure. The Appellant accepted that the burden was on it to show prejudice, but considered that the Commissioner's position was that the threshold for discharging the burden was higher in controversial cases because of the need for public scrutiny and challenge; a position which was challenged by the Appellant as not being supported in law.

112. We agree with the Appellant that the legal position is not that there is a higher threshold for discharging the burden to show prejudice in controversial cases. However, in our view that was not the point being made by the Commissioner, but rather that the point being made by the Commissioner was that the correct approach was that a public authority must show that the need for uninhibited discussion overrides the interest in disclosure. On that view, this is merely restating the Public Interest Test; a position which was accepted by the Appellant. We also consider that the need for public scrutiny and challenge may be factors relevant to the Public Interest Test (as to which we comment further below).

113. We also note that the Appellant had argued that it was wrong to say that information should be disclosed in a finely-balanced matter and we concur that such an approach would be erroneous. However, that was not the position of the Commissioner. The Commissioner's

view was that the information must be disclosed if the scales were evenly balanced. This, of course, reflects the position outlined in the case of *Department of Health* case we cited (paragraph 60.) and therefore we agree that that is the correct approach.

114. We also accept (as a general premise) the Appellant's view that disclosure of information may be more likely to cause prejudice in respect of matters which are particularly controversial. However, this will always need to be assessed on a case by case basis, taking into account (as required by section 2(2)(b) of FOIA) all of the circumstances. As the Commissioner argued, an increased level of controversy in a matter could also mean that there is a greater level of public interest in disclosure.

115. Based on the evidence which was before us and taking into account the submissions of both parties - and considering all the circumstances of the case - we find that the public interest in disclosure of the applicable Requested Information outweighs the public interest in maintaining the relevant exemptions in section 36 of FOIA. Our reasons are as follows.

116. First, we find that the content of the relevant Requested Information is not sufficiently contentious or controversial such that the public interest favours maintaining the relevant exemptions. Whilst we accept that the relevant subsections of FOIA are engaged, when applying the Public Interest Test we do not consider that disclosure would cause the harm which the Appellant has alleged to any material degree such that it is in the public interest not to disclose it and to maintain the exemptions.

117. A certain (not insignificant) amount of the Requested Information is already in the public domain, as confirmed by the witness. In our view, the vast majority of the remaining information contains material which could be classed as 'routine' or 'ordinary' information which many members of the public might reasonably expect, having regard to the Project (or similar projects).

118. Further, the extracts of the withheld information which were quoted by the Appellant in support of its arguments favouring maintaining the exemptions were not, in our view, sufficiently sensitive such that they should be afforded much weight in respect of those arguments. Those extracts were, in our view, the strongest examples that could be quoted from the withheld information in support of the Appellant's arguments. We were not persuaded by the Appellant's arguments that disclosure of the information containing those extracts (and others) may result in relevant individuals, such as leaders of local authorities, no longer engaging with the Appellant in a meaningful way in the future regarding other projects or other matters within the remit of the Appellant. The witness accepted that a safe space was not 'critical' but felt that the absence of one would make discussions more difficult. We agree with Mr Cohen's submission that the thresholds required for prejudice do not need to render the roles impossible. However, even if we were to accept that discussions would be made more difficult, this does necessarily mean that relevant future discussions would be materially adversely affected, or that they would no longer be productive. Indeed, in respect of projects such as the Project, relevant people would presumably be duty-bound to participate in applicable discussions and to appropriately contribute, and – for the reasons cited in the *Davies* case – should not be dissuaded from providing input to projects in a robust and forthright manner simply because a disclosure of information in another matter was previously made under FOIA.

119. The view of the witness was that stakeholders would be aware that records held by the Appellant may be subject to requests under FOIA but that there was an assumption that there would be some applicable exemption which could be relied on to avoid disclosing relevant information. However, we respectfully consider that this view suffers from the flaw identified by Charles J in the *Department of Health* case, cited with approval in the case of *Davies* (see paragraph 46.).

120. We do not expect that all civil servants should be 'highly educated' and 'politically

sophisticated' (as referred to in the *Davies* case). However, we would expect at least a basic understanding by all civil servants of the fact that all information held by a public authority is potentially subject to disclosure in response to a freedom of information request and not to assume (with no disrespect to the witness's alternative view on this) that an exemption to disclosure would protect that information from disclosure. We think that this is especially true in respect of staff working on the Project (and similar projects) and the relevant stakeholders, given the nature of the Project and the likely public interest and potential need for transparency and openness. In this regard, we are mindful that the witness was unable to give some specific examples in support of any of the 'chilling effect' arguments which had been cited by the Appellant.

121. A further relevant point is that the withheld information does not attribute statements to any individual, nor does it reflect a formal position. Consequently, we agree with the Commissioner's analysis that this substantially blunts the prospects of any 'chilling effect' taking root in respect of third parties. Again, this relates to our view that the applicable content of the withheld information is not sufficiently sensitive to support the argument that stakeholders would be inhibited from providing information in the future. We do not see that disclosure of it would, in any material way, preclude or adversely affect any participation in, or contributions in respect of, any relevant future projects.

122. Moreover, we consider that other factors favour disclosure of the relevant Requested Information, most of which are based on the need for openness and transparency, including:

    a. the amount of public money involved;

    b. a significant number of people in the communities involved potentially being affected by the Project;

    c. awareness of the issues regarding the need for school places in the relevant communities, including the extent of that need and how best to meet it, and public interest in the associated debate;

    d. public interest in how the Appellant liaises with its partners, such as schools, colleges and local authorities (especially in connection with the Project and other similar projects); and

    e. the need for public scrutiny and potential challenge, including with regard to any of the above factors and with regard to the Appellant's decision making, data analysis and modelling in connection with the Project.

123. As we have noted, one of the points made by the Appellant with regard to the Public Interest Test was that the future disclosure of relevant information was a significant factor in favour of maintaining the exemptions. On this particular point, we accept that it may be a factor in assessing the Public Interest Test (as part of the consideration of all of the circumstances) but we do not believe that it should be afforded much weight in militating against disclosure of information under FOIA. FOIA itself is not centred around the potential disclosure of information at some point in the future, but with disclosure at the time of the request for that information (albeit within the timescales permitted by FOIA). If the possibility of future disclosure were afforded too much weight in assessing the Public Interest Test then this could effectively thwart the overarching purpose of FOIA whenever this was a relevant factor.

124. Moreover, in respect of this appeal, it is pertinent that there is no absolute duty on the Appellant to disclose the relevant information in the future and, consequently, no timescales by which that disclosure must take place. In this regard, we have taken account of the evidence given by the witness referred to at paragraph 80.. In addition, any such disclosure, even if it were to happen, would not necessarily include all of the Requested Information.

125. For the above reasons, we conclude that, in applying the Public Interest Test, little weight

should be afforded to the possibility of future disclosure as a factor in favour of maintaining the exemptions. We also conclude that, taking into account all of the other factors we have outlined regarding the Public Interest Test, the resulting balance comes down in favour of disclosure of the relevant Requested Information.

126. Accordingly, applying the Public Interest Test, we find that, in all the circumstances of the case, the public interest in maintaining the exemptions in section 36 of FOIA dos not outweigh the public interest in disclosing the applicable Requested Information. Therefore the Appellant cannot rely on section 36 of FOIA to withhold the relevant Requested Information.

Was the Appellant entitled to withhold the personal information of officials below the grade of deputy director pursuant to section 40(2) of FOIA?

127. We start by noting that there appears to us to be some discrepancy in the contents of the Decision Notice, insofar as the Decision Notice held that the Appellant was entitled to withhold "the personal information of officials below the grade of deputy director" (paragraph 3 of the Decision Notice), suggesting that the Appellant was not entitled to withhold the personal information of more senior officials. However, the steps which the Commissioner required the Appellant to take regarding disclosure of the Requested Information, pursuant to paragraph 4 of the Decision Notice, referred to redaction of personal data being permitted but did not distinguish between the seniority of officials in respect of whom those redactions should apply.

128. We have concluded that the Commissioner intended that all personal data be redacted, as it seems to be evident from the further reasoning within the Decision Notice (in particular, paragraphs 119 to 122, inclusive) that the Commissioner considered that no personal data should be disclosed, not just personal data relating to officials at the grade of deputy director and above[26]. We have interpreted the Decision Notice accordingly regarding the steps which the Commissioner required the Appellant to take.

129. In respect of the potential application of section 40(2), it may be helpful to reiterate the Legitimate Interests Basis. It provides: "*processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.*". Translating that language to the context of this appeal:

    a. the disclosure of the Requested Information would be 'processing';

    b. the Requester is the 'third party'; and

    c. any individuals identified or identifiable within the Requested Information are the 'data subjects'.

130. The Appellant has not disputed the Commissioner's position (as set out in the Decision Notice) that:

    a. the Requested Information does contain the personal data of certain individuals and consequently that this does engage section 40(2) of FOIA;

    b. the most relevant data protection principle is that set out in Article 5(1)(a) of the UK GDPR, relating to (amongst other things) personal data being processed lawfully;

    c. in considering whether the processing of the personal data in question is lawful, the most applicable lawful basis for processing is the Legitimate Interests Basis;

26 We also note that paragraph 123 of the Decision Notice erroneously referred to the 'Post Office' and we have treated that reference as though it was a reference to the Appellant.

d. the Legitimate Interests Test is applicable; and

e. having conducted the Legitimate Interests Test, disclosure of the relevant personal data is not necessary and consequently there was no need to conduct the balancing test (the last question of the Legitimate Interests Test, as referred to in paragraph 48.).

131. It is our view that the above position is correct, for the same reasons as were given in the Decision Notice (including in respect of the application of the Legitimate Interests Test and the outcome reached). Likewise, we agree that the first condition (set out in section 40(3A) of FOIA) is met – namely that the disclosure of the relevant information would contravene a data protection principle (in this case, the first data protection principle under Article 5(1)(a) of the UK GDPR requiring personal data to be processed lawfully) – again, for the same reasons as were given in the Decision Notice.

132. As we have noted, if section 40(2) of FOIA is engaged and the first condition referred to in that subsection is satisfied, this is an absolute exemption, which means that there is no need to apply the Public Interest Test.

133. Accordingly, we find that section 40(2) of FOIA is engaged such that Requested Information can be withheld insofar as it constitutes the personal data of individuals.

Was section 42 of FOIA engaged?

134. Turning to the application of section 42 of FOIA, we conclude that this section was engaged. We find (based on both the witness's evidence and our own view of the documents) that the relevant information constituted legal advice which was provided by the Appellant's Legal Advisor's Office. We are therefore satisfied that the information in question constituted legal advice for the purposes of this section. Also, there was no evidence to suggest that the concept of legal professional privilege was waived (notwithstanding that the legal advice was copied and pasted by the Appellant's delivery officer into the document in question) or was otherwise no longer applicable.

135. We also note that it was common ground between the parties that this section was engaged. The issue between the parties was that of the Public Interest Test, to which we now turn.

Did the public interest favour disclosure?

136. Having determined that section 42 of FOIA was engaged, we now need to consider whether the public interest in maintaining the exemption in that section outweighed the public interest in disclosing the information. Again, we remind ourselves that this is to be assessed 'in all the circumstances of the case' as per section 2(2)(b) of FOIA.

137. The Commissioner's position was that the legal advice in question was generic. We do not agree with that view. Whilst we cannot go into detail for the purposes of this decision (to avoid effectively divulging the nature of the relevant information), we find that the legal advice was specific regarding the particular issues it addressed, the legal analysis of those matters and the risks relevant to those issues.

138. The Commissioner had argued that the contents of the legal advice were common sense matters which would be expected to be contained in legal advice to a government department in respect of contentious local projects. Even if that were the case, we consider that this does not alter the nature of the advice as comprising advice to which legal professional privilege applies and we do not accept that this is a material factor in assessing whether or not the Public Interest Test favours disclosure of that advice. In this regard, we also take into account any adverse effect on the concept of legal professional privilege itself (such as confidence in its efficacy and the administration of justice generally), and not simply the effect on this case, as confirmed by the Upper Tribunal in the *DCLG* case. We also agree with the submissions made by Mr Cohen on this issue, as noted in limbs (m) and (n) of paragraph 89., having

regard to the nature of the legal advice in question in this case.

139. The main reasons put forward by the Commissioner in support of his view that the Public Interest Test favours disclosure of the legal advice was that it would provide important context in relation to the process of the Appellant's decision-making and would promote openness and transparency in ongoing discussions relating to the Project. The Commissioner submitted that these considerations are properly described as central to the operation of the FOIA regime. We do not disagree with that submission, but we do not accept that those principles are, in themselves, sufficient to override the strong public interest in the legal professional privilege exemption. Essentially, those are general views which do not materially advance the Public Interest Test in the circumstances of this case.

140. The Commissioner also argued that disclosure of the legal advice "would also lead to improved trust with local stakeholders in the context of a divisive project with important impacts on local children, families, and existing schools". In light of the specific legal advice in question, we are not persuaded by that argument. The Commissioner failed to adequately explain how and why such disclosure would have that stated effect and there was no evidence in support of that view.

141. Ms Kelleher further submitted that, as this was a hotly debated local issue, disclosure of the legal advice would provide context to the decision making and would improve relationships. Whilst we accept that disclosure may provide context to the decision making, we do not consider that this (even with other factors referred to) is a sufficient public interest factor to weigh against the in-built element of public interest legal professional privilege. Again, there was no evidence to support the position that improved relationships would be the result of the disclosure of the legal advice (indeed, the outcome could be the opposite, depending on the nature of the advice in question and someone's view on it).

142. The Commissioner considered that the balance of the Public Interest Test was "very fine" on this particular issue but, for the reasons given, we find that the Commissioner attached too much weight to the factors he took into account favouring disclosure.

143. We accept the Commissioner's views that the exemption in section 42 of FOIA is a qualified exemption which should not be inadvertently elevated to the position of an absolute exemption. Nevertheless, it is an exemption for a reason. We are concerned that disclosure of the legal advice could well affect the ability or willingness of the Appellant's legal advisors from giving full and frank legal advice in the future. As noted, there is a strong element of public interest in-built into legal professional privilege and (whilst we accept that there are exceptions to this and the exemption is not to be treated as an absolute one) legal advisers should generally be free to give advice to their clients without fear of that advice being made public through application of FOIA.

144. We should be clear that we are not saying that there are no circumstances in which advice which is subject to legal professional privilege should not be disclosed, but rather that the disclosure is required only where the public interest in disclosure outweighs the public interest in maintaining the exemption, in accordance with section 2(2) of FOIA. In the current case, though, we find that there are insufficient grounds for concluding that the public interest favours disclosure.

145. Accordingly, applying the Public Interest Test, we find that, in all the circumstances of the case, the public interest in maintaining the exemption in section 42 of FOIA outweighs the public interest in disclosing the applicable part of the Requested Information.

Did the Appellant breach section 10 of FOIA?

146. We should comment that neither party raised this issue in the pleadings, but we consider it should be briefly addressed here given that it was a relevant part of the Decision Notice.

147. As we have noted, the Request was dated 12 November 2020 and the Appellant responded to that on 9 February 2021. Whilst the Appellant stated, in its response to the Request, that it was received on 12 January (2021), there was no evidence before us (including no explanation being given by the Appellant) as to why the Request might only have been received approximately two months after its date. We find, on the balance of probabilities, that the Request will have been received by the Appellant within (at most) a week after it was dated. In drawing this conclusion, we are mindful that there was other earlier correspondence from the Requester which was not responded to by the Appellant - the Appellant's response to the Request referred to that correspondence and stated that the Appellant had no record of receiving it, whilst also apologising for the "overall delay" in responding to the Requester's queries.

148. For the above reasons, it is our view that the Appellant did not respond to the Request within twenty working days of receipt of it, as required by section 10 of FOIA. Accordingly, we find that the Appellant was in breach of that requirement.

Final conclusions

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

150. We find that the Commissioner was correct in determining, by way of the Decision Notice, that:

    a. sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA (prejudice to effective conduct of public affairs) were engaged in respect of the Requested Information but that the public interest favoured disclosure; and

    b. the Appellant had breached section 10 of FOIA by not responding to the Request within twenty working days.

151. As noted above[27], we find that the Decision Notice intended to refer to all personal data being redacted in respect of the Requested Information which was to be disclosed pursuant to the Decision Notice. We consider that the Decision Notice was correct in this regard.

152. We agree with the finding in the Decision Notice that section 42 of FOIA (legal professional privilege) was engaged. However, we have determined that the Public Interest Test favoured maintaining the exemption in respect of the relevant information. We therefore find that the Commissioner erred in law in concluding, in the Decision Notice, that the Public Interest Test favoured disclosure of the information falling within the scope of the exemption in that section.

153. The Decision Notice focussed on only part of the Request and therefore the Commissioner erred in not considering other relevant parts of the Request or addressing whether those other parts of the Request had been properly considered or responded to.

154. We therefore allow the appeal in respect of the ground relating to the application of section 42 of FOIA (legal professional privilege) but refuse the appeal in respect of all other grounds. We make the Substituted Decision Notice as set out above.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 19 August 2023

27 See paragraph 128..