IN THE FIRST-TIER TRIBUNAL **EA/2014/0079**

GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice dated 11 March 2014 FS50492483

Appellant: **Department for Education**

Respondent: **Information Commissioner**

Hearing held at Fox Court London on 16 September 2014

Before

John Angel (Judge)

and

Andrew Whetnall and David Wilkinson

Date of Decision: **28 January 2015**

Date of Promulgation: **29 January 2015**

Subject: Section 35(1) FOIA formulation and development of government policy

DECISION

During the course of the proceedings the Appellant consented to disclose a large part of the Withheld Information with some redactions. In relation to the information which remains in dispute the Tribunal allows the appeal.

REASONS FOR DECISION

Background

1. The Building Schools for the Future programme ("BSF") was a significant capital investment programme announced in 2004 by the then Labour Government. The goal was to rebuild every secondary school in England. The original estimate was that it would cost £45 billion over a period of ten to fifteen years.

2. BSF was organised in 'waves' of funding, with many local authorities being in more than one 'wave'. Sandwell Metropolitan Borough Council ("Sandwell") was in two waves: wave 3 in November 2004 for 10 school projects and wave 5 in December 2005 for 13 projects.

3. On 12 May 2010 Michael Gove MP became the Secretary of State for Education in the new Coalition Government. One of the Government's highest priorities was to bring down the national deficit. BSF was brought to an end through an announcement to the House of Commons by the Secretary of State for Education on 5 July 2010. In accordance with the terms of this announcement, the 10 schools in Sandwell's wave 3 were unaffected but those in wave 5 were stopped. However, the announcement contained a number of errors. One was that the schools in Sandwell's wave 5 were listed as unaffected. This was corrected on 6 July when Sandwell's wave 5 schools were listed as stopped.

4. Six local authorities, including Sandwell, brought a claim for judicial review of the Secretary of State's 5 July decision to end their second waves of BSF investment. The judgement given on 11 February 2011[1] found in favour of the Secretary of State on the substantive grounds (irrationality and substantive legitimate expectation) but in favour of the local authorities on procedural grounds (lack of consultation and failure to have due regard to equality matters). The Secretary of State was required to retake his decision in relation to the schools of the six claimant local authorities, 'with an open mind, and fully discharging his equality duties'.

5. The Department for Education carried out a consultation process. In the course of this, the Secretary of State made a statement to Parliament and wrote to the six claimant local authorities on 19 July 2011 saying what he was minded to do,

[1] R v Sandwell Metropolitan Borough Council and others [2011] EWHC 217 (Admin)

namely fund them in capital grant up to the level of their proven contractual liabilities. On 3 November 2011 the Secretary of State wrote to the local authorities confirming his final decision. The local authorities were paid additional capital grant to reflect the level of proven contractual liabilities.

The Request

6. On 30 September 2012 Bevan Brittan LLP, writing on behalf of Sandwell, made a FOIA request (the Request) in the following terms:

> *"We request copies of all reports, submissions, minutes of meetings and discussions, notes, emails, letters and any other relevant documentation upon which the [decision of the Secretary of State for Education of 3 November 2011 not to provide funding for Sandwell Metropolitan Borough Council's Building Schools for the Future programme] is based. We also request copies of the following specific information:*
>
> 1. *Documentation created in respect of the establishment of the Department's consultation project team, including meeting notes and instructions to the project team;*
> 2. *Evidence of the in-depth review of local authority submissions by the Department's project team to enable it to produce a list of queries and clarifications to send to each claimant authority ahead of their meeting with the Department (meeting notes, minutes, summaries, etc produced);*
> 3. *Commentary prepared by the PfS Project Directors on particular aspects of individual BSF projects prior to meeting the claimant authorities from 15 June;*
> 4. *The information considered by the Department team in reaching the 19 July provisional decision: the funds available to the Department, the financial implications of a range of options and the funds needed to meet the local authorities' requests;*
> 5. *Details of the "range of options" considered by the Department team prior to reaching the 19 July provisions decision;*
> 6. *The Equality Impact Assessment of the final decision prepared by the Department;*
> 7. *Documents evidencing consideration of whether to fund Sandwell's schools on the grounds of basic need or suitability;*
> 8. *Documents evidencing consideration of options relating to the payment of project development costs and contractual liabilities;*
> 9. *Documents evidencing consideration as to whether funding the schools would be justified on equality grounds;*
> 10. *Documents evidencing consideration as to whether or not to make an exception for Sandwell's schools to enable them to be included in the PSBP".*

7. By letter dated 14 November 2012 the DfE withheld the information ("the Withheld Information") under section 35(1)(a) and section 42 FOIA ("Refusal Notice"). Following an internal review, the DfE changed its position and held

that section 35(1)(a) no longer applied but that the exemptions in section 36(2)(b)(i), 36(2)(b)(ii), and 36(2)(c) were engaged and that the public interest balance favoured withholding the information. The internal review also upheld that some of the information was exempt under section 42. It was communicated in a letter dated 25 February 2012, but was in fact 25 February 2013 ("the Internal Review"). Sandwell complained to the Commissioner, who investigated the complaint.

Decision Notice

8. The Commissioner issued a Decision Notice dated 11 March 2014 ("the Decision Notice") holding by way of summary:

    a. The Commissioner rejected the DfE's argument that section 36 was engaged (rather than section 35(1)(a)) because time had moved on and the BSF was no longer subject to policy formulation. The Commissioner held that the passage of time is not relevant as to whether the section 35 exemption is engaged, and that having previously held that the same information was exempt under section 35(1)(a) this remained the case. The Withheld Information related to the formulation of policy regarding school capital funding and therefore section 35(1)(a) applied. Section 36 could not apply as the provisions are mutually exclusive.
    b. The Commissioner considered the public interest arguments in favour of disclosure including the inherent value of open and transparent Government, the value of the public being able to see how decisions are made in contentious areas; the ability to satisfy the public that ministers are well-briefed and that decisions are made on a clear understanding of the facts. Further, the BSF programme and its termination attracted significant public debate at a national and local level and there was a strong public interest in understanding a decision that had the potential to impact on the quality of school provision and educational experience of students. Increasing public understanding of all the issues involved would therefore be in the public interest.
    c. The Commissioner considered the public interest arguments in favour of withholding the information. The Commissioner held that "safe space" arguments that related to the decision to end the BSF programme in July 2010 were no longer applicable. The Commissioner considered the arguments in relation to any chilling effect that might occur as a result of disclosure, but found that these effects were unlikely to be severe and placed limited weight on this.
    d. The Commissioner held that there was considerable public debate around the ending of a major government programme in which substantial sums of public money had been invested to improve the nation's schools and there was a powerful public interest in understanding the whole picture and in providing full transparency to the reasons which led to the decision to cancel the school improvement programme and therefore the public interest in disclosure outweighed the public interest in maintaining the exemptions.

e. The Commissioner held that in respect of some information, section 42 (legal professional privilege) was engaged, and that the public interest in maintaining the exemption outweighed the public interest in favour of disclosure.
f. The Commissioner held that in respect of some information, section 40(2) was engaged and disclosure would be a breach of the first data protection principle and therefore references to identified personal information were exempt.

Appeal to the FTT

9. By a notice of appeal dated 8 April 2014, the DfE appealed against the Decision Notice. The DfE advanced two grounds of appeal, namely:

a. Ground 1 – the Commissioner erred in finding that section 36 was not engaged in relation to the withheld Information.
b. Ground 2 – the Commissioner erred in concluding that the public interest in disclosure of the information withheld under section 35 outweighed the public interest in maintaining the exemption.

10. Further to the service of its Grounds of Appeal, on 21 April 2014 the DfE filed the witness statement of Andrew McCully which sets out an amended position on behalf of the DfE. In short, it is said that:

a. The DfE proposed to disclose Documents 1 – 37, subject to redactions. The redactions relate to information which was said to be withheld under section 21, section 40(2), section 42 and some information was said to be out of scope of the request.
b. The DfE still sought to withhold Documents 38 – 44. The DfE relied primarily on section 36(2), and alternatively section 35(1)(a) to withhold these documents in their entirety. The DfE also relied on further exemptions in relation to parts of these documents (section 21, section 40(2), section 42) and some information is said to be out of scope.

11. The Commissioner accepted that the redactions made to Documents 1 – 37 by reference to section 21, section 40(2) and section 42 were justified and these are not matters at issue in this appeal.

12. The Commissioner did not accept that specified parts of documents fell outside the scope of the request. During the course of the hearing the DfE accepted that all the documents were within the scope of the request except Document 43g.

13. What remains in issue are Documents 38 – 44 subject to redactions that fall within sections 21, 40(2) and 42. The Commissioner accepts the redactions under sections 40(2) and 42 are properly made and are not in dispute in this appeal. The Commissioner accepts that most of the annexes are covered by the section 21 exemption because they are

a. Extracts of relevant legislation already in the public domain; or
b. Drafts of letters later sent to Sandwell; or
c. Information already held by Sandwell; or
d. A transcript of a publicly available judgment.

However the Commissioner put the DfE on notice to prove that some of the annexes had been published by the time of the period between the Request and the Internal Review. The DfE have since done this by providing a revised table of documents with publication dates.

14. There remained two annexes (44d and 44e). In its final submission dated 28 October 2014 the DfE accepted that documents 44d and 44e were not readily available at the time of the Request and it now consents to disclose them. This means that we no longer need to consider the application of section 21 to any of the Withheld Information.

15. In relation to the annexes which are already in the public domain we would ask the Commissioner to let Sandwell know which documents these are so that the authority has the opportunity of finding them.

16. In relation to the remaining documents which are Documents 38 to 44 without annexes except Document 43g ("the Disputed Information") the DfE now relies on section 35(1)(a) being engaged and that the public interest balance favours maintaining the exemption. However if the Tribunal does not accept the exemption is engaged then the DfE relies in the alternative on sections 36(2)(b)(i), 36(2)(b)(ii), and 36(2)(c). This includes Document 43g the only remaining annex in dispute unless we find that it is out of scope.

17. Although the requester was not a party to the appeal it was necessary to hear evidence in relation to the disputed materials in closed session. As far as possible we have included a summary of this evidence in the open part of this decision. There is a closed annex relating to the closed evidence and arguments.

Legal Framework

18. Section 1(1) of FOIA makes provision for any person making a request for information to a public authority to (a) be informed in writing by the public authority whether it holds information of the description specified and (b) if so, to have that information communicated to him.

19. Section 2(2) provides that in respect of any information which is exempt information by virtue of Part II of the Act, the right to have information communicated does not apply to the extent that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". This is known as the public interest test.

Section 35

20. Section 35, in so far as material, provides as follows:
"*Section 35(1)*
Information held by a Government department or by the Welsh Assembly Government is exempt information if it relates to –
(a) the formulation or development of government policy,…

21. Section 35 is a class based exemption. There is much case law relating to this provision. This Tribunal is not bound by any decision of the Information Tribunal or another First-tier Tribunal ("FTT"). However it can take note of any persuasive arguments in such decisions, but is not bound by them. The FTT is of course bound by decisions of higher courts. In relation to the case law the parties variously brought the FTT's attention to the following matters:

    a. The question in determining whether section 35 is engaged is whether "the information relates to the formulation or development of government policy" and this would appear to be answered by considering the contents of the information itself.
    b. The characterisation of the information cannot change over time. The fact that particular information contained in a document relates to the formulation of policy at a particular point in time, does not mean that it no longer relates to formulation of policy once the policy has in fact been finalised.
    c. The timing point goes solely to the question of the public interest balancing exercise.
    d. The words "relates to" and "formulation and development of policy" in section 35(1)(a) can be given a "reasonably broad interpretation".
    e. Every decision is specific to the particular facts and circumstances under consideration.
    f. No information within section 35(1)(a) is exempt from the duty of disclosure simply on account of its status, of its classification as minutes or advice to a minister nor of the seniority of those whose actions are recorded.
    g. The timing of a request is of importance to the decision. When the formulation or development of a particular policy is complete is a question of fact. A parliamentary statement announcing the policy will normally mark the end of the process of formulation.
    h. In judging the likely consequences of disclosure on official's future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants.

22. From the case law where information falls within the class described in section 35(1)(a) there is no presumption of a public interest in non-disclosure and no inherent weight is to be attached to the fact that information relates to the formulation or development of government policy in the public interest balancing exercise. Section 35 does not automatically deem or assume that disclosure of the information will be harmful. The DfE need to demonstrate to the Tribunal the actual interest that it is seeking to protect by maintaining the

exemption, rather than just pointing to the fact that information is of a sort that falls within the class described in section 35(1)(a).

Section 21

23. Under section 21(1) *"information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."*

Section 36

24. If we find that section 35(1)(a) is not engaged the DfE ask us to consider whether section 36 is engaged. We accept they are entitled to do this so we set out the section, in so far as material, which provides as follows:

"(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."

Is section 35(1)(a) engaged?

25. The Commissioner found the exemption was engaged. The DfE is now prepared to accept for the purposes of the hearing that this exemption is engaged. We have reviewed the evidence and find that the policy which was being formulated and developed in this case was in relation to the closure of the BSF programme. This means we do not need to consider the alternative exemption, namely section 36.

Public interest test

26. The DfE consider the point that the public interest test is to be applied is the time of Internal Review which was 25 February 2013. This point has been considered in a number of higher court decisions. These have accepted that the point at which the public interest is to be applied will be somewhere between the time of the request and the review depending on the circumstances of each case. In this case the Request was made on 30 September 2012.

27. When applying the public interest the DfE brought the Tribunal's attention to the Upper Tribunal's decision in *Foreign and Commonwealth Office v Information Commissioner and Plowden* [2013] UKUT 0275 (AAC) at [15] and [16].

Scope of Request

28. The only document left for us to consider whether it is within scope is Document 43g. It has already been disclosed that Document 43g relates to the DfE's capital budget. Point 4 of the Request refers to "information considered by the Department team in reaching the 19 July provisional decision" and specifies in terms "the funds available to the department". The document was attached as an annex to Document 43 the provisional decision recommendation and refers directly to the BFS programme. Although we are told it was only background information for completeness sake we can only assume that it was taken into account in the provisional Sandwell decision. This is a strong factor indicating that the information falls within the scope of the request. Similarly, information relating to the "funds available to the department" i.e. wider capital spending position, is what could be assumed Sandwell had requested.

29. In addition we have considered the evidence and arguments given in the closed session and have concluded that Document 43g is within scope and must be considered under section 35(1) with the other Disputed Information. We set out in the confidential annex to this Decision the relevant closed evidence and arguments we have also considered in coming to this decision.

The Evidence

30. Andrew McCully the Director General for Infrastructure and Funding within the DfE gave evidence before us. Having accepted that all the Withheld Information was within the scope of the Request except Document 43g the only evidence of relevance, except background information and that related to Document 43g, related to the public interest factors that McCully said we should be taking into account and the weight to be given to these factors.

31. Before doing this we would summarise the evidence given by Mr McCully in closed session that can be included in the open part of this judgment.

32. The closed material consists of seven submissions prepared by civil servants for the Secretary of State and relevant attachments (which in one case itself comprises an earlier Ministerial submission). The seven submissions to ministers are described in Mr McCully's closed witness statement as follows:

> Submission dated 12 February 2011: Consultation Process (Document 38)
> Submission dated 25 February 2011: Further advice on the consultation process (Document 39)
>
> Submission dated 12 May 2011: Authority meetings and assessment criteria (Document 40)
>
> Submission dated 20 May 2011: Further advice on the use of criteria (Document 41)

Submission dated 1 July 2011: Situation report and handling (document 42)

Submission dated 13 July 2011: Sandwell minded to letter (Document 43)

Submission dated 26 October 2011: Sandwell decision (Document 44)

33. During the course of the closed session, in respect of each of the documents, Mr McCully was asked about the contents of the document, the extent to which the information was already in the public domain or reasonably accessible to the requester, to describe the effect of disclosure of the document (including any harm that he believed would be occasioned by disclosure) and the extent to which disclosure would promote the public interest in transparency and openness in relation to the decision making process itself and the options considered by the Secretary of State. Mr McCully was asked to highlight particular areas of sensitivity in relation to the documentation and further clarified that some of the material in the closed bundle could now be disclosed as it was already in the public domain.

34. In the course of his evidence Mr McCully accepted, in respect of a number of these submissions to Ministers, that the public would gain a greater understanding of the detail of the decision-making process undertaken by the Department than is already in the public domain, and further would gain an understanding of the various options (with their respective benefits and risks) that were put before the Secretary of State for consideration prior to reaching a final decision. However, in relation to some of the submissions he considered that a member of the public would gain no greater understanding that they would have done by reading the information that had been sent to the local authorities at the time and which the local authorities had been encouraged to share with those in their local area who were interested in the outcome of the decision.

35. He explained that the difference between the material that was already in the public domain (namely the final decision dated 3 November 2011) and the submissions to Ministers, was that the submissions set out the various options considered by the Minister, whereas the publicly available documentation set out the final position arrived at by the Secretary of State but did not refer to other options which had been considered and rejected. He accepted that in some instances disclosure of the withheld material would increase the public's confidence in the decision making process and that the public interest could be heightened in light of the legal flaws previously identified by the High Court in the related Judicial Review claim, in the procedure conducted by the Department in arriving at its original decision to cancel the BSF programme. In the course of his evidence, Mr McCully also referred consistently to a 'drip-drip' effect of disclosing such information, which in his view would erode the safe spaces in which officials were able to advise Ministers on policy matters, ultimately leading to a chilling effect and less frank advice being given to Ministers.

36. As to the inclusion of an earlier Ministerial submission as an attachment to the 13 July 2011 submission, Mr McCully said that information in any part of that attachment that fell within the scope of the Request was also summarised in the body of the 13 July 2011 submission itself. The disclosure of that relevant information would therefore fall for consideration as part of the treatment of 13 July 2011 submission. All of the other information in the attachment was out of scope. The attaching of an earlier Ministerial submission was a common practice and intended to remind Ministers of the context within which relevant prior decisions had been taken.
    Since this evidence was given the DfE has consented to disclose all the annexes to Document 43 except annex 43g which are not already in the public domain.

37. Mr McCully in open session considered that disclosure of what we are now calling the Disputed Information would be likely to inhibit the free and frank provision of advice and exchange of views. He says there must be a safe space for Ministers to be briefed effectively and candidly. Officials must be able to speak truth unto power and to do so without having to qualify that advice because of the presentational impact of the manner or formulation of that advice or because the terms of the advice, rather than the decisions themselves may damage future relationships and effective working with external stakeholders. Knowledge that policy submissions were likely to be published would have the effect that officials would write for two audiences. Where they now write for Ministers only, they would take into account the possibility of dissemination to all. There would be a tendency to cover all the bases, to seek or avoid soundbites relevant to the presentation of policy, and to give less trenchant and sharp advice in the knowledge that it might be quoted against Ministers in the event of disclosure. In short it would confuse drafting to inform the decision and drafting to present and defend it, with the effect that support for policy formulation became less efficient. This risk applied to all submissions once it became apparent that a high bar would no longer operate to protect against disclosure of civil service advice. He continued to develop in his evidence this “chilling effect” on how government would be able to conduct its business in the future if the Disputed Information was disclosed. He gave an example of how the drafting of the Coalition government agreement had not involved Civil Servants. He considered that although the Civil Service Code provided clear principles on how to operate he did not consider disclosure in this case would improve standards.

38. Mr Mc Cully also considered that disclosure in this case could have an adverse affect on record keeping. His experience is that since the introduction of FOIA in 2005 Ministers increasingly require face to face briefing but still accept in principle that advice to Ministers should be recorded.

39. Further, Mr Mc Cully explained to us how he does not believe that the passage of time since a government decision changes the expectation of those providing the advice that the information would be protected. Nor does it reduce the potential impact on future exercises with similar levels of complexity and sensitivity. The very fact that there may be future disclosure risks a negative impact on the nature of advice offered and the way in which it is offered. This, in

his view, is a fundamental principle and that official advice should be kept confidential to permit a full and frank exchange of views and that these should be protected regardless of the passage of time.

40. In cross examination he accepted that the sensitivity in disclosure falls away over time but slowly.

41. Mr Mc Cully recognised that there is a general public interest in transparency but in this case sufficient information is already in the public domain following the Judicial Review proceedings and the retaking of the original decision and the fact the DfE are now releasing much of the Withheld Information.

42. Mr Mc Cully explained in cross-examination that following the Judicial Review the consultation process was set out very clearly and the transparency of the process was important. The eventual decision was detailed in letters to authorities like Sandwell. A statement was made in Parliament. He accepted that the pubic interest in transparency and openness was of increased importance because of the original flawed process in closing down the BSF Programme. However he was not convinced that disclosure of the Disputed Information would increase public confidence in the process.

43. Mr McCully admitted that in respect of the material in the main body of the seven Ministerial submissions, disclosure now would have relatively little impact on the specific process of policy-making and decisions about the BSF programme. However, the DfE argues that the balance of public interest is clearly in favour of withholding the information because of the cumulative potential chilling effect on Ministerial submissions, arising from disclosure of future submissions about a controversial and sensitive policy issue.

44. In summary Mr McCully confirmed that in respect of each and every one of Documents 38 to 44 (including 43g) still in dispute that disclosure would prejudice the brevity, clarity, candour and effectiveness of future official submissions to ministers, and that this chilling effect of disclosure would outweigh the public interest in disclosure.

Public interest balance

45. The public interest factors in favour of maintaining the exemption as explained by Mr McCully are set out in his evidence above.

46. DfE asks us to give particular strength to the factors in favour of maintaining the exemption because:
    a. Mr McCully is a very senior official with extensive experience of preparing submissions for Ministers. His evidence cannot be lightly dismissed and must be accorded due weight particularly as it was the only evidence we heard.
    b. As to whether disclosure of the Disputed Information would increase public confidence in the decision-making process, Mr McCully stated that this would not necessarily be so given that the relevant factors

were already in the public domain. In particular, he pointed to the first letter at Document 39a, where the Department specifically asked the local authorities concerned to share all information with local schools; the letters at Documents 40a and 44c; and the information in Documents 1-37.

c. Mr McCully was an entirely open and candid witness. The fact that he was willing to accept there would be no particular harm from disclosure of certain material and, for example, that there would be a heightened public interest following the Judicial Review challenge, gives his evidence in relation to his principled position in relation to disclosure of Ministerial submissions considerable weight.
d. However, in any event, in his view a different set of considerations would outweigh the fact that the public might be reassured by seeing the Disputed Information. Mr McCully's evidence was that the relationship between officials and Ministers was a privileged and special one. Ministers have the responsibility for making often difficult decisions and should be able to expect full, frank and candid advice. The expectation of publication of a Ministerial submission would bring other parties into that relationship. Mr McCully argued that this would in effect reduce, not improve, transparency. Knowledge of likely publication would affect the preparation of a Ministerial submission because it would open the dialogue to third parties and profoundly alter its character. The hybrid documents that would result would carry with them the dangers of aiming for (or seeking to avoid) a sound bite (i.e. considering how the advice would be reported, rather than focussing on its content), a blandness of form and a desire to cover every base.
e. Although Mr McCully accepted there was no blanket exemption in relation to Ministerial submissions, there was nonetheless a high bar to overcome before the public interest would weigh in favour of disclosure. That was because of the effect on the quality of advice, on the decision-making process and the special relationship between Ministers and officials. Disclosure of Ministerial submissions would have a "drip drip" effect. Mr McCully stressed he was not suggesting that any particular case would tip the balance but in his experience, the general effect of disclosure was already beginning to be seen. When asked by the Tribunal on possible consequences, he suggested this case would be regarded as a particularly large "drip".
f. In response to questioning from the Tribunal, Mr McCully stated that the effect of disclosure was already being seen in how advice was delivered. For example, more advice was now presented in tabular or graphic form rather than by way of narrative.

47. By contrast, the Commissioner argues that there is limited evidence that disclosure of the Withheld Information would result in any real prejudice or harm. The Commissioner accepts and endorses the proposition that it is important for there to be effective Government, including a good working relationship between Ministers and civil servants. The Commissioner does not take any issue with that objective, but does take issue with the extent to which any harm will result to such an objective by the disclosure of the Withheld Material.

48. The DfE's arguments in support of its case that the submissions to ministers should not be disclosed can be summarised as:

    a. The potential chilling effect on the advice given to ministers and request by ministers for advice;
    b. That sufficient information is in the public domain already; and
    c. The submissions contain particularly sensitive material, namely officials' advice on budget priorities.

49. The Commissioner challenges these arguments and submits that there is little compelling evidence of a real risk of chilling effect arising from disclosure of the Disputed Information. The Commissioner says:

    a. There can be no chilling effect on the expression of views within the context of the BSF policy specifically, as this policy decision had already been finalised prior to the Request.
    b. There was no cogent evidence before the Tribunal of any radical behavioural change since FOIA came into force in 2005. Since that time it has always been a possibility that ministerial submissions will be disclosable under FOIA.
    c. No precedent will be created by the disclosure of the Withheld Information given that each case must be considered on its own merits.
    d. The Tribunal is entitled to expect civil servants to perform the roles expected of them to best of ability, informed by standards of behaviour set out in the code of conduct and that they will proceed (notwithstanding the potential for disclosure) to set out facts and advice to ministers clearly in their submissions.

50. Although we have taken these matters into account we are persuaded by Mr McCully's evidence that disclosure of the Disputed Information (not the Withheld Information) as a whole could have the chilling affect he describes in the particular circumstances of this case. We examine the circumstances below.

51. Although the Commissioner makes a case for there not being sufficient information in the public domain the evidence before us shows that there was a significant amount of information about the whole consultation process in letters to Sandwell and the other local authorities, statements to Parliament and press releases.

52. The public interest factors in favour of disclosure are set out in the Decision Notice summary set out in paragraph 8 above.

53. The Commissioner argues that where ministers have responsibility for taking significant and controversial decisions there is a public interest in open and transparent Government, both in relation to the substance of a decision and also the procedure followed in reaching a decision. The reason why openness

and transparency are important is so that the public is able to understand why and how decisions are taken.

54. Whilst we agree with the Commissioner that openness as to the substance, the factual basis and the reasons for a decision are important, transparency as to the internal procedure by which the decision is reached would tend to disclose civil service advice possibly placing tensions between Ministers and civil servants and perhaps bringing them into party political arguments.

55. The circumstances of this case are different from the initial policy decision to wind up the BSF programme. It is concerned with the procedural requirements following the High Court decision requiring the Department to consult with the six authorities and consider with an open mind representations from them concerning the affected schools. The Judicial Review did not challenge the Secretary of State's right to change the policy and scrap the BSF programme. It accepted that the macro economic and political nature of the decision was "an area into which the courts should be slow to tread."[2]

56. The High Court's finding - a failure to consult and to have due regard to equalities issues - heightens the public interest in ensuring that the decision in relation to the position of 6 local authorities was re-taken on a sound basis and in accordance with proper procedure. This was not a straightforward task however because the capital budget of the Department had been cut very substantially, and it would not have been possible to meet the claims in respect of all the six authorities and their schools without finding £800m within a budget being reshaped to support other priorities.

57. We would also observe that where decisions as to budget allocation are centralised, and government holds the purse strings over issues affecting particular local authorities and schools, local authorities will want to ensure that the Department has a full understanding of local facts, will want to get the best deal for their schools and feel a good deal of frustration with centralised power over decisions and priorities that, in their view, ought to be local. This will be all the stronger when expectations of funding have been profoundly disturbed.

58. From the evidence in this case it is clear that the consultation process adopted has been very largely disclosed. What has not been disclosed is the various options that had been considered by the Secretary of State and the advice given in relation to the options. This is what the DfE consider is worthy of the safe space needed by the Secretary of State. The Commissioner considers disclosure of the Disputed Information would cause little harm because the policy was complete by the time of the Request, and that one of the purposes of disclosure would be to enable the public to check that Ministers were well briefed – the value of the public being able to see how decisions are made in contentious areas.

[2] Para 11 of Holman J's judgement

Our Conclusions

59. This has been a difficult case for the Tribunal. The Disputed Information covers the complete internal process by which a policy has been further developed from the start of that process to the final decision. Information which is part of the Disputed Information and provides the consultation process with Sandwell has been disclosed. What has not been disclosed is the various options and advice given to the Secretary of State which are integral parts of the Disputed Information. Mr McCully forcefully argues that if the Disputed Information in this case is disclosed it will further erode the confidential relationship between Ministers and Civil servants. This is not merely an argument that frankness and candour could be suppressed. It would expose a very significant part of the working relationship between Ministers and the politically neutral civil service to a deeper and not necessarily constructive degree of scrutiny. The impact would no doubt differ from case to case, but there are plausible risks that exposure of policy submissions would cause submissions to be written in a different way with an eye to a public audience and presentation, and could further change the inclination of Ministers to seek and rely on formal advice, or to take advice only in circumstances that tend to be less fully committed to paper.

60. We find Mr McCully's evidence, particularly because it is based on his expert experience, and the arguments of the DfE that to disclose the whole of the process with its consideration of various options and recommendations at each stage would amount to an erosion of the safe space needed to devise the necessary consultation process. We also consider that the detailed arguments that disclosure could inhibit the free and frank provision of advice and exchange of views between civil servants and ministers in the future, in the circumstances of this case, are strong. In other words we find that disclosure of the Disputed Information as a whole could have a chilling effect on the way government would be able to go about its business in the future. We agree with Mr McCully that it would be another "drip" which could lead to the tipping effect he was so concerned about. We consider this is a very strong public interest factor in favour of maintaining the exemption.

61. We have taken into account that the consultation process had been completed by the time of the Request and although this lessens the need for a safe space for the Government's decision in this case it does not necessarily lessen the chilling effect on future government conduct as explained by Mr McCully in his detailed evidence.

62. We also accept that there is a strong public interest in transparency and openness in the particular circumstances of this case because:

    a. The ending of BFS programme was a major policy decision impacting on large numbers of children and their parents country wide which attracted significant public debate.

    b. The decision involved a large amount of public funds.

    c. The process had been successfully challenged before the High Court.

d. This necessitated a new process for consultation with six local authorities.

e. The process would be expected to be subject to particular scrutiny because of the High Court decision.

f. This could best be achieved by greater openness and transparency of the process.

63. However the major policy decision had been taken. This case is about the need for consultation so that the Government can properly determine how 6 local authorities should be treated. The High Court required this to be a proper process. These factors affect the weight that can be given to the public interest in transparency and openness.

64. We have examined the Disputed Information in detail. The consultation process was very largely disclosed at the time it was taking place in letters to Sandwell and the other public authorities, through meetings, Parliamentary statements and press releases. The Disputed Information in our view clearly shows that the Secretary of State was properly briefed. We are also of the view that the process took place in the way the High Court envisaged that the Secretary of State should retake his decision in respect of the claimants' schools "with an open mind, fully discharging his equality duties".

65. As a result the weight we consider should be given to the public interest in disclosure is much reduced in this case. In other words we consider that the weight we give to the public interest factors in favour of disclosure is less than the weight we give the public interest factors in favour of maintaining the exemption.

66. In the particular circumstances of this case we unanimously find that the public interest in maintaining the exemption for the Disputed Information as explained above outweighs the public interest in disclosure. In coming to this conclusion we have noted the extent of the information that is now in dispute has been significantly reduced during the course of these proceedings and that much of the Withheld Information has been or will be disclosed.

67. Our more detailed analysis of the Disputed Information is contained in the Confidential Annex.

Signed:

John Angel

Judge

Date: 28 January 2015