First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0001
EA/2018/0002

Heard at East London Tribunal Hearing Centre
On 23 May 2018
Panel Deliberations 13 June 2018 and 26 November 2018
Representation:
Appellant: (Department of Health): Azeem Suterwalla (Counsel)
First Respondent: (The Information Commissioner): Zoe Gannon (Counsel)

Before

JUDGE BUCKLEY

HENRY FITZHUGH AND NIGEL WATSON

Between

THE DEPARTMENT OF HEALTH

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. For the reasons set out below and in the closed annex to this decision the Tribunal allows the appeal against Decision Notices FS50655276 and FS50698283 and issues the following substitute decision notices.

2. The Tribunal accepts that the disputed information must remain secret during the proceedings. There is a closed annex to this decision. A redacted version of the closed annex will be released but not until 35 days have elapsed after the promulgation of this decision or until after the conclusion of any further appeal in this case.

SUBSTITUTE DECISION NOTICE

Public Authority: The Department of Health

Complainant: Ms Sara Spary OBO Buzzfeed News

The Substitute Decision – FS50655276

1. For the reasons set out below s35(1)(a) of the Freedom of Information Act 2000 (FOIA) is engaged but the public interest in disclosure outweighs the public interest in maintaining the exemption in relation to the parts of the withheld information identified in the closed annex.

2. For the reasons set out below s35(1)(a) of the Freedom of Information Act 2000 (FOIA) is engaged but the public interest in disclosure is outweighed by the public interest in maintaining the exemption in relation to the remainder of the withheld information identified in the closed annex.

Action Required

1. The Public Authority is required to respond to the complainant's request within 49 days of the promulgation of this judgment by supplying the information identified in the closed annex.

The Substitute Decision – FS50698283

1. For the reasons set out below s35(1)(a) of the Freedom of Information Act 2000 (FOIA) is engaged but the public interest in disclosure outweighs the public interest in maintaining the exemption in relation to the parts of the withheld information identified in the closed annex.

2. For the reasons set out below s35(1)(a) of the Freedom of Information Act 2000 (FOIA) is engaged but the public interest in disclosure is outweighed by the public interest in maintaining the exemption in relation to the remainder of the withheld information identified in the closed annex.

Action Required

1. The Public Authority is required to respond to the complainant's request within 49 days of the promulgation of this judgment by supplying the information identified in the closed annex.

REASONS

Introduction

1. The government launched Childhood Obesity: A Plan for Action ('the Plan') on 18 August 2016. The requests under consideration in this appeal are for copies of drafts of that strategy.

2. This is the Department of Health's joined appeal against the Commissioner's decision notices FS50655276 and FS50698283 of 30 November 2017 which held that the Department of Health ('the Department) had correctly engaged the exemption in s 35(1)(a) of the FOIA but that the public interest in disclosure outweighed the public interest in maintaining the exemption. The Commissioner required the Department to disclose the three official draft versions of the Childhood Obesity Strategy and drafts number 1, 35 and 68.

3. The drafts are referred to in this decision as drafts A-F:
Draft A (draft number 1)
Draft B (draft number 35)
Draft C (official draft)
Draft D (draft number 68)
Draft E (official draft)
Draft F (official draft)

Procedural background

4. The hearing took place on 23 May 2018. There was insufficient time to hear full submissions from the Department on the issue of redaction. The Tribunal therefore indicated at the conclusion of the hearing that if the Tribunal was considering ordering disclosure of redacted versions of the withheld information the Department would be given the opportunity to make further submissions.

5. After meeting to deliberate on 13 June 2018 the Tribunal informed the parties that it was considering ordering disclosure of redacted versions of the withheld information. A case management order dated 28 June 2018 gave dates for further written submissions or evidence on redaction and requested availability for a reconvened one-day oral hearing which was listed for 26 November 2018.

6. Paragraph 4 of the order dated 28 June 2018 provided that the parties should attempt to agree a draft redacted version of the withheld information to be considered by the Tribunal at the reconvened hearing. Both parties indicated

that this was not possible, and this paragraph was revoked by order dated 7 August 2018.

7. The Commissioner indicated on 1 August 2018 that it did not intend to attend the reconvened hearing. Despite having requested and received a number of extensions to the date for filing further submissions, the Department ultimately filed short written submissions dated 5 October 2018 indicating, in essence, that it was unable to materially add to the submissions and evidence already filed. The Department stated that it did not intend to attend the reconvened hearing. The Commissioner indicated by way of email dated 9 October 2018 that it did not wish to provide further written submissions and questioned whether the listed hearing was necessary given the position of the parties. The reconvened hearing listed for 26 November 2018 was therefore vacated and replaced with the Tribunal's deliberations on the same date.

Factual background

8. In the Plan the government announced the following measures or initiatives:
   - 8.1. Introducing a soft drinks industry levy.
   - 8.2. A Public Health England (PHE) led programme to take out 20% of sugar in nine categories of products by 2020. Work will then move on to cover remaining relevant food and drinks.
   - 8.3. From 2017, extending the sugar reduction programme to setting targets to reduce total calories in a wider range of products.
   - 8.4. Supporting innovation to help businesses make their products healthier.
   - 8.5. Updating the nutrient profile model.
   - 8.6. Encouraging local authorities to adopt the government Buying Standards for Food and Catering Services, particularly in leisure centre vending machines.
   - 8.7. Collaborating with PHE, NHS England and the Behavioural Insights Team to trial behavioural interventions in NHS Hospitals, measuring changes in purchasing behaviour and the impact on revenue from sales.
   - 8.8. Recommitting to the Healthy Start scheme.
   - 8.9. Helping all children to enjoy an hour of physical activity every day. Ofsted will assess how effectively leaders use the Primary PE and Sport Premium and measure its impact on outcomes for pupils. PHE will develop new advice to schools. A new interactive online tool will be made available to schools to help plan 30 minutes of activity per day.
   - 8.10. Improving the co-ordination of sport programmes for schools.
   - 8.11. Creating a new healthy rating scheme for primary schools which will be taken into account during Ofsted inspections. In 2017 Ofsted will undertake a thematic review on obesity, healthy eating and physical activity in schools, providing examples of good practice.
   - 8.12. Updating the School Food Standards.

8.13. The Secretary of State for Education will lead a campaign encouraging all academies and free schools to commit to the standards.

8.14. Reviewing additional opportunities to go further in labelling. This might include clearer visual labelling, such as teaspoons of sugar.

8.15. Developing voluntary guidelines for early years settings to help them meet current government dietary recommendations. In early 2017, launching a campaign to raise awareness of the guidelines.

8.16. Working with PHE, Innovate UK etc. to bring forward a suite of applications that enable consumers to use technology and data to inform decisions. PHE will hold an annual 'hackathon' for innovative solutions to address childhood obesity.

8.17. Reviewing where content can be strengthened in materials for visits by midwives and health visitors. Exploring how healthy weight messaging can be introduced at other contact points.

9. The Plan followed a 2015 Public Health England (PHE) report, *Sugar Reduction: The Evidence for Action*.[1] After the publication of the Plan, the government faced criticism in the media and in the Health Select Committee for not including a number of recommendations made by Public Health England in its report. The government also faced criticism for watering down the plan from a previous leaked version which was described in a Channel 4 Dispatches programme called 'The Secret Plan to Save Fat Britain'.

10. There are numerous examples of this in the bundle, including the following:

> …the strategy contains neither of the two measures that Public Health England (PHE) said would have the most impact on the child obesity epidemic … Asked to investigate the issue and make recommendations on what should be done, PHE backed a sugar tax and reductions in sugar content of foods but prioritised two other measures:
>
> Banning price-cutting promotions of junk food in supermarkets, such as multipacks and buy one get one free, as well as promotion of unhealthy food to children in restaurants, cafes and takeaways.
>
> Restricting advertising of unhealthy food high in salt, fat and sugar to children through family TV programmes such as Britain's Got Talent and The X Factor, as well as on social media and websites.
>
> Neither appears in the strategy
>
> (The Guardian, 18 August 2016, *Childhood obesity: UK's 'inexcusable' strategy is wasted opportunity, say experts.*)
>
> Obviously, there has been a lot of disappointment in the change from what appeared to be the Cameron version to what has become the final version.

[1] We were not provided with PHE's initial report or recommendations, but the recommendations are summarised in a number of documents in the bundle including in the Select Committee proceedings and the Guardian Article dated 18 August 2016 'Childhood obesity: UK's 'inexcusable' strategy is wasted opportunity, say experts'.

(Dr Whitford, question to Nicola Blackwood, Minister for Public Health and Innovation in the Health Committee oral evidence: Childhood obesity follow up 7 February 2017.)

Requests, Decision Notice and appeal

The Requests

11. Decision Notice FS50655726 concerns the following request made on 17 August 2016:

> Please send me word or PDF copies of every official draft version of the Childhood Obesity Strategy. Where I say official, I am aware they are numbered i.e. copy 1,2,3 – so it is these I am referring to.

12. The Department of Health has now confirmed that there are three 'official drafts' (drafts sent for approval by the Home Affairs Committee), that fall within the scope of this request. They are referred to in this decision as drafts C, E and F.

13. Decision Notice FS50698283 concerns the following request made on 1 August 2017:

> Draft 1, Draft 35, Draft 68 (or two before the final version if more than 70). Please confirm the date these were completed.

14. These are referred to as 'working' drafts. They are referred to in this decision as drafts A, B and D.

The Department's reply

15. The Department's initial response to the first request on 15 September 2016 stated that the information was exempt from disclosure under s 35 FOIA. It upheld that decision on an internal review on 24 October 2016.

Referral to the Commissioner

16. The matter was referred to the Commissioner on 14 November 2016. In correspondence with the Commissioner the Department also relied on s 14(1). The Department said that it had found approximately 70 draft versions. It indicated that it would not be applying s 35(1)(a) as a blanket exemption and therefore it needed to review the material in the drafts as some may be disclosed and other information may engage specific exemptions. The Plan had been developed and formulated in close consultation with other departments and the Department would need to consult closely with each department to allow them to consider specific information and whether this should be disclosed.

17. Subsequently by letter dated 16 October 2017 the Department stated that these 70 drafts were working drafts and that there were only three official drafts. The Department then confirmed by letter dated 6 November 2017 that it was relying on s 35(1)(a) to withhold all the information in the three official drafts and the working drafts. This letter contains the first detailed consideration of s 35(1)(a) by the Department. The Department acknowledges the following public interests in disclosure:

17.1. Promoting transparency in the way public authorities operate.
17.2. Measures to tackle childhood obesity remain live and open to debate and scrutiny.
17.3. A strong public interest in making information readily available on measures to tackle childhood obesity.
17.4. The measures remain rightly at the forefront of the public mind.

18. Against disclosure the Department stated:

18.1. 'Formulation' of policy refers to the early stages of the policy process when options are generated or analysed, risks are identified, consultation occurs, and recommendations or submissions are put to a minister who decides which options should be translated into political action.
18.2. The requested information relates to the formulation of policy measures to tackle childhood obesity, some of which are currently in their early stages of formulation, are still being developed or have been put on hold.
18.3. Disclosure could damage relationships with key stakeholders by exposing measures being developed that were not included in the published strategy.
18.4. These organisations are ultimately responsible for implementing the measures and any compromise to this relationship will be detrimental to delivering policy and reducing childhood obesity.
18.5. Work is ongoing in relation to policies explored in previous drafts.
18.6. Where detail remains under consideration disclosure would be detrimental to its future development and damaging to stakeholder relationships.
18.7. The purpose of s 35 is to protect good government. Civil servants need to be able to engage in the free and frank discussion of all policy options internally. Their candour will be affected by their assessment of whether the content of such discussion will be disclosed in the near future.
18.8. Premature disclosure could prejudice good working relationships and the neutrality of civil servants.
18.9. Some of the information may have already been published, but there is little public interest in duplicating it.

19. Despite the indication in its letter dated 16 October 2017 that it would not be applying s 35(1)(a) as a blanket exemption, the Department does not seem to have reviewed the specific material in the drafts to consider if some might be

disclosed. Instead it applies two blanket arguments: anything that has not already been published is covered by the arguments set out above; and in relation to anything that has already been published there is little public interest in disclosure.

The Decision Notices

20. In her decision notices dated 30 November 2018 the Commissioner decided that s 35(1)(a) was engaged but the public interest balance favoured disclosure. The reasoning in each decision notice is identical.

21. The Commissioner decided as follows:

    21.1. The purpose of s 35(1)(a) is to protect the integrity of the policy making process. In particular it ensures a safe space to consider policy options in private.
    21.2. The exemption is engaged: the draft versions related to the formulation of a policy.
    21.3. The Commissioner does not understand how disclosing the information would impact on the safe space needed by government. The safe space argument carries much less weight because the final version of the strategy had been published and widely discussed in the media at the time of the request.
    21.4. The Commissioner is usually sceptical of arguments that civil servants will no longer be willing to properly contribute to policy formulation because of disclosure of information.
    21.5. There is some validity to the argument that disclosing details of options that are still being considered might be detrimental to the continued formulation of the government's strategy to tackle obesity.
    21.6. It seems evident from numerous articles around the strategy that recommendations not featuring in the published Plan are well known and there is evidence that the final Plan has been 'watered down'. This adds to the public interest in disclosure.
    21.7. The Department has not evidenced any specific harm in disclosure, whereas there is substantial and widespread interest in and concern about how the strategy was arrived at.
    21.8. Overall the public interest favours disclosure.

Notice of Appeal

22. The Department appealed against the Commissioner's decision notice. In summary, the relevant parts of the notice of appeal challenge the Commissioner's decision notice on the grounds that:

    22.1. The Commissioner's factual findings/conclusions on the public interest were incorrect. If she had not erred in making these findings, she would have concluded that the public interest favoured maintaining the exemption.

22.2. The Commissioner was wrong to conclude that disclosure would not cause significant harm.
22.3. The Commissioner failed to properly undertake the balancing exercise required under s 2(2(b) FOIA.

Ground One – factual findings/conclusions

23. The Department argues that:
23.1. It was wrong to refer to the Plan as a 'final version' of policy. Policy is still being developed and therefore the 'safe space' argument should not have been given less weight.
23.2. It is not correct that much of the information in the drafts was in the published strategy.
23.3. It is not 'evident' that recommendations featuring in the Plan were widely known. There is no/insufficient evidence to support a finding that there is 'widespread concern' that the Plan 'only focusses on the so called 'sugar tax' and not other recommendations.

Ground Two - harm

24. The Department argues that disclosure will adversely impact the relationship between the Department/government with key stakeholders and would inhibit the Department/government's ability to formulate policy around childhood obesity.

Ground Three – public interest balance

25. The Department argues that the Commissioner's reasoning is contradictory (see above). The Decision Notices do not show how the Commissioner adequately weighed up the factors, in that it is unclear what weight was being attached to each of those factors.

The ICO's response

26. The ICO's response dated 31 January 2018 submits that:
26.1. It was open to the Commissioner to conclude that the Plan was the government's plan, as it stood at that time, on what policies it would be implementing to deal with childhood obesity.
26.2. Simply because further policies might be developed in this area does not mean that the balance automatically falls in favour of maintaining the exemption.
26.3. Whether 'much' or 'some' of the information was published in the Plan does not shift the weight in the balancing exercise.
26.4. The Commissioner was entitled to conclude on the basis of the media reports that the recommendations were widely known and that there was widespread concern about the focus in the Plan on the 'sugar tax'.

26.5. The Commissioner did not make contradictory findings and properly carried out the public interest balancing exercise.

Legal framework

27. The relevant parts of s 1 and 2 of the FOIA provide:

> General right of access to information held by public authorities.
> 1(1) Any person making a request for information to a public authority is entitled—
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.
>
> Effect of the exemptions in Part II.
> .....
> 2(2) 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.

28. Section 35 of FOIA (omitting sub-section (5), which simply defines certain terms) provides as follows:

> 35 Formulation of government policy, etc.
> (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,
> (b) Ministerial communications,
> (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
> (d) the operation of any Ministerial private office.
>
> (2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—
> (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
> (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.
>
> (3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
>
> (4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual

> information which has been used, or is intended to be used, to provide an informed background to decision- taking.

29. Section 35 is a class-based exemption: prejudice does not need to be established for it to be engaged. It is not an absolute exemption. The Tribunal must consider if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

30. Case law has established in the FOIA context that "relates to" carries a broad meaning (see **APPGER v Information Commissioner and Foreign and Commonwealth Office** [2016] AACR 5 at paragraphs 13-25). In **UCAS v Information Commissioner and Lord Lucas** [2015] AACR 25 at paragraph 46 the Upper Tribunal approved the approach of the FTT in the APPGER case where it said that "relates to" means that there must be "some connection" with the information or that the information "touches or stands in relation to" the object of the statutory provision.

31. The question of whether the policy-making process is still 'live' is an issue that goes to the assessment of the public interest balancing test, and not to whether the section 35(1)(a) exemption is engaged in the first place (**Morland v Cabinet Office [2018] UKUT 67 (AAC).**

32. The inter-section between the timing of the FOIA request and its relevance to the public interest balancing test is helpfully analysed by the First-tier Tribunal in **Department for Education and Skills v Information Commissioner and the Evening Standard (EA/2006/0006)** ("**DFES**") at paragraph 75(iv)-(v) (a decision approved in **Office of government Commerce v Information Commissioner [2008] EWHC 774 (Admin); [2010] QB 98** ("**OGC**") at paragraphs 79 and 100-101):

> (iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.
>
> (v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, s. 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will

> normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances. As is plain however, we do not regard a "seamless web" approach to policy as a helpful guide to the question whether discussions on formulation are over.

33. The public interest can wax and wane and the need for a safe space changes over time in relation to development of policy.

34. If disclosure is likely to intrude upon the safe space then there will, in general terms, be significant public interest in maintaining the exemption, but this has to be assessed on a case by case basis.

35. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect, in this case the efficient, effective and high-quality formulation and development of government policy (see e.g. para 57 in the FTT decision in **HM Treasury v ICO EA/2007/0001)**.

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

> "… when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

37. When a qualified exemption is engaged, there is no presumption in favour of disclosure. 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 Tribunal concludes that the competing interests are evenly balanced, we 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) (**Department of Health v Information Commission and another [2017] EWCA Civ 374** .

The role of the Tribunal

38. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may

receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence and submissions

39. The Tribunal received open and closed bundles of documents and heard evidence from Mr Richard Sangster on behalf of the Department. It heard submissions in open and closed sessions in accordance with its normal procedure for protecting such information until there is a decision of this Tribunal requiring disclosure which has not been successfully appealed.

Mr Sangster's open evidence

40. Mr Sangster is the lead official for childhood obesity in the Department. He was the lead author of the plan throughout its development and the lead for the overall policy and strategy for the Plan. His evidence was as follows.

Open evidence on the extent to which policy work was ongoing

41. One plan was never going to solve the problem of obesity. The government made clear internally and externally that the Plan was 'the start of the conversation and not the final word' and that further action would be taken if results were not seen. A number of arrangements were set up to monitor progress. The Plan forms part of the overall strategy on childhood obesity and does not mark the end of policy development.

42. Although public announcements were made saying that the focus was on implementing the Plan, this does not mean that behind the scenes they were not developing policy.

43. In order to keep pace with the evidence in these areas, the government set up an obesity policy research unit a year later to publicly show that they were gathering evidence.

44. There have been further policy announcements since the Plan: In August 2017 the government announced a new Policy Research Unit and the implementation of a calorie reduction programme.

Open evidence on the public interest balance

45. The drafts provide little context of the process of decision making and analysis that led to a particular draft and release would provide the public with a very limited understanding of the policy process.

46. The drafts would not help to inform the debate. They appear to indicate what the government was considering but they are snapshots in time. It is difficult

for the government to explain why they were using one measure over another. The public would not understand the point of a draft. It is not in all cases what the government intends to do. It is a process of policy development. This could be explained by government, but not necessarily understood.

47. If the drafts were released it would have an effect across government. The Department would have to completely rethink how they develop, design and discuss policies amongst themselves.

48. Mr Sangster explained the purpose of the drafts. Some of the drafts are documents that could at some point be published as a record of the government's intention: pulling together the meetings, the brainstorming sessions, analysis etc. into one document. Others are presentational and stylistic - not necessarily a record of the government's intentions. They are kept so that others coming into the team know what has happened, and they are very useful when policy development is continuing to inform what the government might do in the future.

49. The safe space required for the development of government policy lies at the very heart of the policy making process, the effective conduct of public affairs and securing the effective delivery of major government programmes.

50. The obesity policy is a major policy with significant implications for many departments. A safe space is required for candid advice and free and frank exchanges of views (which may be diametrically opposed between departments) without undermining the final collectively agreed government position. Such candour can only exist within a space that provides the assurance of confidentiality and discretion.

51. Publication of policy while being developed will have a chilling effect: there is a real risk that the raising of potentially unpopular policy considerations may be prejudiced if officials or Ministers are concerned that the public airing of those considerations will give rise to public opprobrium.

52. Exposure of policies being developed that were not in the final plan could cause significant harm to relationships with stakeholders.

The 'gist' of closed evidence

53. Mr Sangster's closed evidence is set out, where relevant, in the attached closed annex. Although the hearing was public, there was nobody in attendance who could not hear the closed evidence. It was therefore not necessary to provide a gist of the closed evidence at the hearing.

54. Due to pressures of time at the end of the hearing, the parties were asked to agree a proposed gist of the closed session for the Tribunal to include in the

open decision. The parties were unable to agree a proposed gist and the Tribunal must therefore decide on the appropriate gist, taking into account the parties' submissions and their proposed gists.

55. The purpose of a closed session is to ensure that the effects of the Rule 14(6) direction is not undermined. Non-disclosure must be limited to what is necessary. The Tribunal reminds itself of what was said by the Court of Appeal in **Browning v ICO [2014] EWSA 1050:**

> What is also important is that when the FTT excludes both a party and his legal representative it does its utmost to minimise the disadvantage to them by being as open as the circumstances permit in informing them of why the closed session is to take place and, when it has finished, by disclosing as much as possible of what transpired in order to enable submissions to be made in relation to it. The same commitment to maximum possible candour should also be adopted when writing the reasoned decision.

56. The Tribunal's view is that the draft gist proposed by the ICO is an appropriate gist. It accurately reflects the evidence that was given at the hearing, based on all three members of the Tribunal's recollection and on the Judge's non-verbatim notes. Further detail on the Tribunal's reasoning is set out in the closed annex. We find that revealing this particular part of the evidence does not undermine the effect of the Rule 14(6) direction. It does not reveal the content of the withheld information. Taking into account the principles in **Browning**, we find that it should be included in the gist. Because of the potential for an appeal on this issue, the disputed sentence from the gist and part of the Tribunal's reasons on this issue appear in the closed annex and will remain closed until the conclusion of any appeal.

Gist of the closed evidence of Mr Sangster

57. Mr Sangster's closed witness statement contained detailed information as to the differences between policies and initiatives contained within the requested drafts and the published Plan of 18 August 2016. It also contained information as to why he considered that disclosure of the requested drafts could cause significant harm to relationships with stakeholders.

58. In his closed oral evidence, Mr Sangster was asked some supplementary questions in examination-in-chief by Mr Suterwalla, Counsel for the Appellant. Mr Sangster provided further information as to what extent policy development in respect of childhood obesity had been ongoing since publication of the Plan. He also provided specific details as to the work undertaken in respect of particular policies, and the content of those policies, contained within the requested drafts. Mr Sangster also gave examples, as to the harm he claims would have occurred to stakeholder relationships and in the development and implementation of policy, had disclosure occurred.

59. Mr Sangster was asked a number of questions by way of cross-examination by Ms Gannon during closed session. His evidence was to the effect that disclosure would adversely affect stakeholder relationships, including personal relationships, and that this would make development and implementation of policy more difficult. It would also detract resources away from policy development to deal with enquiries from stakeholders and the media. Mr Sangster explained how he considered it was necessary to have a safe space to consider policy ideas and a number of policies were still being considered. **[Redacted: in the closed annex]** Mr Sangster stated that if the information was disclosed he would not write anything down in future and would need to review record keeping practices with colleagues/the team which may also prompt a wider government consideration of record keeping practices to ensure a safe space.

60. Mr Sangster was also asked questions by the Tribunal. His answers addressed the extent to which policies contained within the drafts had been developed and worked on since the Plan had been published. He also gave evidence as to the harm which he claimed would occur to stakeholder relationships and also to the development and implementation of policies contained in the drafts, had disclosure of the drafts taken place.

Submissions

61. The Tribunal read and heard closed and open submissions from Ms Gannon and Mr Suterwalla.

The ICO's open submissions

Timing

62. The date for assessing the public interest is the point at which the requests were refused by the Department in August 2017 and October 2017.

63. Timing is important under s 35. The public interest can wax and wane and the need for a safe space changes over time in relation to the development of policy. There would have been a clear safe space argument in August 2016 at the date of the first request.

64. Although not technically binding, Tribunals generally do not depart from paragraph 75(iv) of **DFES.**

Was policy development still in progress?

65. The mere inclusion of the phrase 'this is the start of a conversation' or public announcements that further action has not been ruled out should carry little weight. The mere fact that resolving the obesity crisis will take time and will

not be resolved by the policies in the plan does not in itself demonstrate that the obesity plan was still in the formulation stage.

66. The Department does not claim that policy development was still in progress in relation to any of the initiatives included in the plan.

67. In relation to any initiatives that are in the drafts but not in the plan, the Tribunal will have to determine on the evidence whether or not policy development was ongoing. If policy development was ongoing in relation to a particular policy, that particular policy could be redacted, rather than the whole document being withheld.

68. The evidence before the Tribunal was not sufficient in relation to any of the policies. The ICO accepts that they were in varying stages of consideration.

Significant harm would or would be likely to be caused by the release of the drafts

69. Any alleged harm must be harm to the particular interests protected by the exemption, here the efficient, effective and high-quality formulation and development of government policy.

70. Any argument that Ministers or civil servants will be reticent in performing their role for fear of public scrutiny is weak (see **DFES** at para 75(vii) and **HM Treasury v ICO** at para 57).

71. The evidence before the Tribunal is not sufficient to establish that disclosure will cause distraction spending time dealing with 'fallout' that is any more than the normal business of government. It is unclear why a resourcing issue is a relevant factor.

72. The evidence on the effect on stakeholder relationships is vague and not sufficient.

73. Any chilling effect on the future behaviour of government is due to the introduction of the FOIA: **DBERR (**para 123). S 35 does not provide a blanket exemption and therefore there is always a risk of disclosure.

74. The assertion by Mr Sangster that civil servants might not write anything down should be treated with scepticism (see **DBERR** para 126), so should the assertion that lobbyists would be reluctant to engage with government: there is a strong inbuilt interest in lobbying (see **DBERR** para 127).

75. The Tribunal should carry out a careful factual analysis of exactly what is being argued in relation to what would be harmed and what would not be harmed.

76. None of the undisclosed policies are so outrageous that disclosure would damage the policy development process and because of the very high interest in disclosure and the high level of policy in the drafts, even though they were still in the process of development the public interest falls in favour of disclosure.

77. If there were particular policies where there was a particularly high interest in maintaining the safe space, they could be redacted.

The public interest in disclosure

78. There is a general public interest in transparency in policy development. It can improve policy formulation and decision making (see **HM Treasury** para 58(1)); enable the public to promote public debate and lobby in favour of options not taken up (see **HM Treasury** para 58(5)).

79. There is a strong public interest in knowing what other options were being considered but were not included. There is extensive coverage of the subject in the Houses of Parliament, select committee evidence and the media and many public statements by the government. It is not merely of interest to the public: public health is one of the most important issues that the government deals with. There is evidence that the final Plan was 'watered down' to enable a more informed debate about a public health crisis.

The Department's open submissions

80. Mr Suterwalla submitted that the drafts contain a large number of initiatives and proposals which are not in the public domain. Policy making is ongoing on childhood obesity. The public interest heavily favours maintaining the s 35(a) exemption where the information relates to ongoing policy development. Disclosure would remove the 'safe space' and have a chilling effect on future government decision-making.

81. Premature release of details of undisclosed initiatives and proposals would or would be likely to prejudice the ability of government to translate them into policy.

82. The public interest in disclosure of transparency in government decision making and the interest of the public in the subject matter do not outweigh the harm which disclosure will cause.

Policy development still ongoing

83. The government had repeatedly stated that the Plan represented the start of the conversation and not the final word. After the Plan was published there were further policy announcements and two specific measures have been

agreed, neither of which were in the published Plan. Mr Sangster's evidence shows that there were several initiatives and proposals in the drafts which were not widely known. Mr Sangster was, at the date of the hearing, developing a chapter 2 of the plan for publication (given the subsequent publication of Chapter 2, the Tribunal does not think it is necessary to keep this information in the closed annex).

84. Had the drafts been disclosed in October 2016, this would have constituted the release of government policy while it was still being formulated and developed. Disclosure at this stage is highly unlikely to be in the public interest (see **DFES v ICO and The Evening Standard, EA/2006/0006**).

Significant harm would or would likely be caused

85. The release of policy whilst in the process of formulation will prima facie be highly unlikely to be in the public interest and therefore prejudicial to government. The undisclosed initiatives are in formulation/development. The Department says that this, in of itself, means that the Tribunal should find that the public interest does not favour disclosure.

86. In addition, Mr Sangster gave evidence of actual prejudice:

86.1. Chilling effect. Disclosure of undisclosed initiatives will attract attention, support and criticism. Knowing or fearing that measures will be disclosed before being translated into policy will impact on the way that officials and ministers discuss, develop and formulate measures.
86.2. Officials will be distracted by spending time dealing with fallout.
86.3. The premature release of policy may lead to a breakdown in relationships with key stakeholders, making it harder to implement policy.
86.4. Stakeholders might take anticipatory steps to counter forthcoming government policy.
86.5. Because of this risk of harm, knowing or fearing that measures will be disclosed before being translated into policy will impact on the way that officials and ministers discuss, develop and formulate measures.

87. In his oral submissions Mr Suterwalla submitted that there was uncontested evidence that policy was still being developed. The ICO's position that information should be disclosed is unprecedented: it is unprecedented to order the release of information/policy details whilst the process of policy development is ongoing. The authorities relied upon by the ICO are cases where policy formulation is not ongoing.

88. The case law is clear that it is highly unlikely that public interest will favour disclosure where policy development is ongoing. Although it is not an absolute exemption, the starting point should be that disclosure is highly unlikely

unless a good reason can be given on the facts of the case that outweighs the general statutory position.

89. Mr Suterwalla referred us to paragraph 75(i) and (iv) of **DFES**. He submitted that much of what Mr Sangster said fell within what was set out in paragraph 75(iv).

90. After the plan had been published, policy was still being formulated and developed, including commissioning research, meetings with stakeholders etc. This all falls within the concept of time and space to hammer out policy.

91. The effect of disclosure would be the premature release of information on policy options which are being actively considered and which the public don't know about. The Department says that they are not widely known by the public.

92. This falls squarely within the need for a safe space. If written work created when developing and formulating policy were to be released, then it is not surprising that officials would be concerned about what will happen next time. They would need to ask themselves: How do I develop policy in a way that gives us the space to hammer out options and develop policies without fear that I will then have to deal with the fallout? The fear of lurid headlines is a legitimate fear recognised in para 75(iv) of the **DFES** case. If the undisclosed policies were released in this case, this would lead to all manner of headlines and public consideration in circumstances where options are still actively being considered.

93. The starting position is that it is highly unlikely to be in the public interest. The example given in **DFES** of exposing wrongdoing in government should be borne in mind when considering the public interest test.

94. In this case, these are not options that are not being pursued. The evidence is that the options are being pursued.

95. The primary focus should be on the particular interest that the exemption is designed to protect: the efficient, effective and high-quality formulation of government policy (**HM Treasury v ICO EA/2007/0001 at** para 57).

96. The effect on the ability of government to get things done through having to spend time dealing with the fallout should not be minimised. The exemption is designed to protect the efficient formulation of policy. Distraction is a legitimate argument (see ICO's guidance at para 197 'The Commissioner accepts that government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases').

97. Para 199 of the ICO's guidance states: 'The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight'. The ICO now accepts that there was ongoing policy development. It cannot at the same time say that the government has made a decision.

98. The Decision Notice proceeded on the mistaken assumption that the Plan was the final plan and that the other options had been discarded. The ICO accepted in the Decision Notice at para 40 that there was some validity to the argument that if options were still being considered and developed then disclosing details might be detrimental. The cases say that in those circumstances disclosure is highly unlikely to be in the public interest.

99. The Tribunal is asked to make a finding of fact that it was not the case, as stated in the DN at para 41, that the recommendations not featuring in the final Plan were widely known. There is no evidence to support that finding and it was not a point that was pushed in cross-examination.

100. The articles in the bundle do not establish that the public knew about these undisclosed initiatives and policies, nor do they evidence that there was widespread concern that the plan only focussed on the sugar tax.

101. The ICO's decision notice accepted that there should be a safe space, but here there were reasons to disclose because the undisclosed initiatives were widely known (which is not accepted) and that there was widespread concern that the Plan focussed on the sugar tax (which is not accepted).

102. The Decision Notice finds that there is evidence to suggest that the final version differs significantly from earlier drafts and is 'watered down'. However, the evidence before the Tribunal is that the process is ongoing. Policy is still being formulated. The public may say, and they have, that the plan in August 2017 did not go far enough, and they have not been stopped from saying that through non-disclosure.

103. At paragraph 42 the Decision Notices conclude that the ICO is not persuaded that there is any significant harm taking into account that the final version had been published. The basis on which this decision has been taken is misguided.

104. The strong starting point is non-disclosure, and the ICO fails to correctly recognise this.

105. In conclusion, the balancing exercise falls down in favour of maintaining the exemption. Policy formulation and development was ongoing and there is a significant public interest in maintaining the exemption where this is the case. Specific evidence has been given on harm in relation to some of the policies.

The Department accepts that there is a public interest in transparency but not at the expense of frustrating the policy development process or frustrating the ability of government to have a safe space. The additional factor of a high level of interest in the subject does not go far enough to override the significant public interest in not disclosing.

106. There was very little time for Appellant to make submissions about redaction. The limited submissions that Mr Suterwalla made were as follows:

106.1. Redacting the drafts would not prevent the harm caused by the lack of safe space and the chilling effect.
106.2. Officials do not sit down and write a draft thinking about what is likely to be disclosed and what is not likely to be disclosed. Officials will not know at the time of writing what is likely to be redacted.
106.3. Where there are parts of the drafts which reflect content in the public domain the Department would seek to rely on s 21.

107. At this point the Tribunal judge indicated that if the Tribunal was considering ordering disclosure of a redacted version, we would allow the Department to make further submissions. The further submissions submitted by the Department were that the Appellant's position was that s 35(1)(a) applies to the disputed information in full and it was unable to materially add to the submissions made at the hearing. In the light of this we have assumed that the Department does not wish to raise s 21 and we have not considered this exemption.

The gist of closed submissions.

108. In Ms Gannon's closed submissions, she addressed Mr Sangster's evidence that there would have been harm to stakeholder relationships had disclosure taken place. In support of the Respondent's case that the public interest favoured disclosure, she addressed the Tribunal on the nature of the policies in the drafts and claimed that there was a strong public interest in the contents of the drafts as they disclosed which policies the government was considering to tackle one of the biggest public health issues the country is facing. That was distinct from what is of interest to the public. She also relied on particular features of Mr Sangster's closed evidence, and the relationship he had described having with stakeholders, as a further special feature for why disclosure should occur. Ms Gannon also claimed that the s. 35 exemption was qualified and as such any such "chilling effect" would have occurred with the passing of FOIA, not the disclosure of this information. Finally, Ms Gannon claimed that the harm allegedly caused by the disclosure had been overstated by the Department, in particular in relation to the evidence by Mr Sangster as to what steps he and his department would take as to recording information internally, had disclosure taken place, and also other assertions as to harm, including how it would fundamentally alter how policy was developed in the future.

109. In his closed submissions Mr Suterwalla also addressed the issue of alleged harm to stakeholder relationships and the claimed special features raised by the Respondent. His case was that, contrary to the Respondent's case, the nature of the policies contained within the drafts supported the fact that they were a work in progress, which therefore favoured the exemption being maintained. As to the manner in which Mr Sangster had communicated with stakeholders, Mr Suterwalla submitted that this was not a special feature favouring disclosure. Mr Suterwalla's case was that Mr Sangster had given concrete and specific examples in his evidence as to the harm that would occur vis a vis relationships with stakeholders, and in the formulation and development of policies in the drafts. These examples showed that the harm was not exaggerated. Whilst he accepted that s. 35 incorporated, to some extent, a "chilling effect", this was distinct to the chilling effect which would occur, and the removal of a "safe space" for formulating and developing government policy, were disclosure of policies, which were in development, to occur.

Open discussion and conclusions

110. The grounds of appeal and the Department's submissions address, in part, the findings of fact made by the Commissioner. We have had significantly more evidence before us than the Commissioner had at the time of the Decision Notice. We do not need to form a conclusion as to whether or not the Commissioner's conclusions were reasonable on the basis of the information that was before her.

111. Based on the arguments made by the parties the Tribunal considers that it needs to address the following issues:

111.1. What is the relevant date in this case for determining the balance of the public interest?
111.2. Is there a general principle that the appellant does not need to adduce evidence of harm if policy formulation or development is live at the relevant date?
111.3. On the facts, was policy formulation or development live at the relevant date?
111.4. On the facts, does the public interest in maintaining the exemption outweigh the public interest in disclosure in relation to the entire document irrespective of content, due to the status or nature of the document as a working or official draft?
111.5. On the facts, does the public interest in maintaining the exemption outweigh the public interest in disclosure in relation to the specific contents of the document/the information contained in the document?

ISSUE 1: What is the relevant date for determining the balance of public interest?

112. The Tribunal finds that the relevant date is 6 November 2017. This is the date of the Department's substantive response once clarity had been obtained from the requestor on the scope of the request, i.e. the specific drafts that were requested.

ISSUE 2: Is there a general principle that evidence of harm does not need to be adduced if policy formulation or development is live at the relevant point?

113. We were referred by Mr Suterwalla to paragraph 75(iv) of **DFES**, where the first tier Tribunal said:

> We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government.

114. The submissions of the Department based on this paragraph went close to suggesting that in all s 35(a) cases where a policy is 'live' at the relevant time the public interest balance must necessarily come down in favour of disclosure in the absence of something akin to wrongdoing within government. The appellant bases this submission on para 75(iv) **DFES** and its citation in other cases and derives support from the fact that disclosure while policy is ongoing is unprecedented.

115. We do not accept this as a general principle. This would mean that regardless of whether there was, on the facts, any prejudice to the public interest as regards the particular policy or matter to which the information related, disclosure when a policy was 'live' must *necessarily* result in significant prejudice by reason of some general impact on the public interest factor which the exemption is designed to protect.

116. Because of the breadth of 'relates to' and the wide range of information that could come within the scope of s 35(a) this cannot be right. This is not what we understand the First Tier Tribunal to be saying in paragraph 75(iv) of **DFES** and to the extent that they were saying that, we would disagree.

117. We do not think that the first tier Tribunal meant it to be a principle of general application. Firstly, it uses the term 'discussion of policy options'. Information that falls within s 35(a) is not limited to discussion of policy options. Therefore, it is unlikely that the Tribunal was intending to set out any general rule in relation to all matters falling within s 35(a). Secondly that sentence has to be seen in context. Paragraph 75(i) makes clear that each case turns on its facts. This is inconsistent with an intention to set out a general rule. It is simply a statement that identifies the likelihood, in general, of disclosure being ordered of discussion of policy options where policy formulation or development is still live. This is a useful guide for a Tribunal, but it cannot determine the outcome in any particular case.

118. Some of the harm identified by Mr Suterwalla was said to flow from disclosure of policy formulation documents while policy development was live merely because a topic was of significant interest to the public. We accept that potential damage to policy making will be strongest when there is a live policy process to protect, and that it will not be outweighed by the mere fact that a topic is of significant interest to the public.

ISSUE 3: Was the policy live at the relevant date?

119. We accept that policy formulation or development under the broad heading of tackling obesity was ongoing at the relevant date:

119.1. We place limited weight on the government's repeated public statement that the Plan was 'the start of the conversation and not the final word.' The fact that this Plan was not going to finally solve the problem of obesity does not mean that policy formulation or development was, as a matter of fact, ongoing at the relevant time.

119.2. We do not put much weight on the further policy announcement on calorie content in August 2017. This appeared in the Plan in any event and was announced before the relevant time for the purposes of assessing the public interest.

119.3. We accept that the establishment of an obesity policy research unit supports the contention that policy work in relation to obesity in general was ongoing.

119.4. We accept Mr Sangster's closed evidence as to the type of work which was ongoing.

120. The fact that policy formulation or development was ongoing in relation to tackling obesity does not mean that policy formulation or development was live in relation to *all measures* that might be taken to tackle obesity. The umbrella policy work does carry weight in the public interest balance, but in our view, because the liveness of policy formulation or development has a significant impact on the assessment of the public interest, we cannot adopt a broad-brush approach and simply find that policy formulation or development was ongoing in relation to childhood obesity in general. Policy formulation or development is likely to remain ongoing in relation to childhood obesity for many years. This does not mean that policy development in relation to every measure or policy in that sphere will remain live for all those years.

121. Unless there is evidence to the contrary, where a policy was announced in the Plan we find, on the balance of probabilities, that policy formulation or development was not ongoing at the relevant date in relation that policy. There is evidence to the contrary in relation to a small number of these policies and we deal with this in the closed annex.

122. In relation to policies not announced in the plan we accept that policy formulation or development was ongoing at the relevant date in relation to a number of policies that appear in the drafts in accordance with the closed evidence of Mr Sangster. Our detailed findings on this appear in the closed annex.

ISSUE 4: On the facts, does the public interest in maintaining the exemption outweigh the public interest in disclosure in relation to the entire document irrespective of content, due to the status or nature of the document as a working or official draft?

123. In our view it is not appropriate to assess the public interest in relation to the entire document, irrespective of content. We find the following paragraphs in the Upper Tribunal's judgment in **Department of Health v Information Commissioner** [2015] UKUT 159 to be of assistance in relation to a contents-based approach to public interest:

> 30. So a contents based assertion of the public interest against disclosure has to show that the actual information is an example of the type of information within the class description of an exemption (e.g. formulation of policy or Ministerial communications or the operation of a Ministerial private office), and why the manner in which disclosure of its contents will cause or give rise to a risk of actual harm to the public interest. It is by this route that:
> i) the public interest points relating to the class descriptions of the qualified exemptions, and so in maintaining the exemptions, are engaged (e.g. conventions relating to collective responsibility and Law Officers' advice) and applied to the contents of the information covered by the exemption, and
> ii) the wide descriptions of (and so the wide reach of) some of the qualified exemptions do not result in information within that description or class that does not in fact engage the reasoning on why disclosure would cause or give rise to risk of actual harm (e.g. anodyne discussion) being treated in the same way as information that does engage that reasoning because of its content (e.g. examples of full and frank exchanges).
> 31. That contents approach will also highlight the timing issues that relate to the safe space argument. The timing issues are different to the candour or chilling effect arguments in that significant aspects of them relate to the likelihood of harm from distracting and counterproductive discussion based on disclosure before a decision is made.
> 32. Finally, I record that I agree that a contents approach does not mean that the information is not considered as a package (see Foreign and Commonwealth Office v Information Commissioner and Plowden [2013] UKUT 275 (AAC) at [16]). Indeed, such a consideration accords with the nature of a contents-based assessment because it reflects the meaning and effect of the content of the relevant information.

124. These parts of the judgment remain binding on us. Further the Court of Appeal **[2017] EWCA Civ 374** approved a contents-based approach at para 46 (my emphasis):

> I agree with Charles J that, 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 regards 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.)

125. We note the decision in **Plowden** referred to the Upper Tribunal above, and we look at the information in context, i.e. on the basis that it appears in a draft childhood obesity Plan. However, this does not mean that we must treat the document as a whole without regard to its contents. The FOIA regime is concerned with information not documents. When considering the public interest, we must look at the particular information contained in the document (see e.g. paras 33-36, **DBERR v Information Commissioner and Friends of the Earth EA/2007/0072).**

126. Further, we note that some of the information contained in the draft plans relates to policies which were announced in the Plan and not 'live' at the date of the request. This makes it difficult to assess the public interest in disclosing or not disclosing the document as a whole.

127. Finally, we note that a contents-based approach was the initial approach of the Department, set out in its letter of 7 June 2017:

> DH therefore considers that to review all these draft documents (to check and compare all the changes/differences in each version), in circumstances when the final version has now been published, would be disproportionate, overly burdensome…
>
> Furthermore, the policies in the documents were developed and formulated in close consultation across government… DH would need to consult closely with each of these departments to allow them to consider specific information and whether the information may be disclosed or withheld (and, if withheld, under which exemptions and what public interest considerations.

128. The Department later confirmed in a letter dated 11 July 2017 that:

> …we would not seek to rely on a blanket exemption (i.e. s35(1)(a)) to withhold all the information but would instead carefully need to review all the material to consider what information can safely be disclosed and what information is exempt (for example, under s 35(1)(a) and, if exempt, where the balance of public interest lies.
>
> We imagine that some of the information may well be disclosed – in particular, the same information which has since been published…there could be very little, if any, public interest in seeing information when that same information has now been published. And in relation to any further information which is different from the published version…we would have to consider any applicable exemptions under part II, in particular s 35(1)(a), and carry out a

public interest test, consulting relevant departments and stakeholders as appropriate.

129. This is what the Tribunal considers to be the correct approach. This does not mean that we do not take account of the submissions and evidence related to harm which, the Department submits, flow from the nature of the document in which the information is contained. That is part of the context which we must take into account.

130. A further reason in support of this approach is set out in the closed annex.

***ISSUE 5**: On the facts, does the public interest in maintaining the exemption outweigh the public interest in disclosure in relation to the specific contents of the document/the information contained in the document?*

Public interest reasons for disclosure:

131. Looking at all the evidence we have identified the following factors in support of the public interest in disclosure.

132. Childhood obesity has an extremely significant effect on the public both in terms of the cost to the NHS and the cost to individuals and families who are directly affected.

133. Disclosure of the information contained in the drafts would have enabled a more informed scrutiny of the process and decision making behind the government's policies on reducing childhood obesity. We accept that the drafts represent a 'snapshot' of the policy development process and therefore do not cast light on the overall process of policy formulation or development. We do not think that this significantly reduces their value in informing scrutiny of the process. Any specific request for information at a particular point in the policy formulation or development process will necessarily produce a snapshot rather than a complete picture. We find that the public would understand the nature of a 'draft', but if necessary, we find that this could be explained without too much demand on resources.

134. Measures to tackle obesity, particularly in childhood, were the subject of intense public debate at the time. Knowing the information contained in the draft plans would have informed the public debate on how childhood obesity was being or should have been tackled. Again, we do not accept that the nature of a draft as a snapshot significantly reduces its value to the public debate for the reasons set out above.

135. There is a strong public interest in knowing what measures were included in previous drafts that were not included in the plan, particularly because:

135.1. Questions had been asked publicly in the media and in the Select Committee on Health about whether or not the Department properly took on board recommendations from Public Health England in developing the policy, including restrictions on junk food advertising to children; restricting junk food promotions; and applying the sugar tax more widely to sugary milk drinks or sugary drinks with fruit ingredients.

135.2. Concerns had been raised in the media and by the Select Committee on Health about whether the measures adopted in the Plan went far enough and that the measures were weaker than those contained in a previous leaked draft.

135.3. Concerns had been raised about whether industry lobbyists had caused the changes to the Plan.

136. There is a general public interest in promoting transparency and openness in the way public authorities operate.

137. There is a general public interest in transparency of discussions within government and in particular how it plans and implements its strategy for presentation of its policies.

Public interest in favour of maintaining the exemption.

138. We accept that the purpose of s 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government. It reserves a safe space to consider policy options in private – civil servants and subject experts need to be able to engage in free and frank discussion of all the policy options internally, to be able to expose their merits and demerits and possible implications. This is particularly important where the policies, like many obesity policies, have cross-departmental elements.

139. We do not accept that there can be any space where confidentiality can be 'assured' because s 35(a) is not an absolute exemption.

140. We accept that the need for a safe space is much greater when development of that policy is nearer the live end of the spectrum at the relevant date. We think that there is most impact on this safe space in this case through the disclosure of detailed policy proposals. On the facts in this particular case, we think that, in general, there is a lower chance of the harm identified by the Department as impacting on the safe space flowing from the disclosure of background evidence or broad, high level intentions. This is not the case in relation to all the policies and we have approached this on the basis of the particular information requested and the evidence of the impact of its disclosure on the development or formulation of policy.

141. We do not put a lot of weight on the effect of disclosure of this information on the candour of civil servants, subject experts or ministers in the future. If those individuals are properly informed, they will appreciate that the greater the public interest in the disclosure of confidential, candid and frank information, the more likely it is that they will be disclosed. The chilling effect comes, in the main, from the passing of the FOIA and we rely on the courage and independence of senior civil servants to be robust in the face of a risk of publicity (see **Lewis** and **DBERR**).

142. We take a similar approach to Mr Sangster's suggestions that nothing would be written down in future and that a decision in this case to disclose the information would have the effect that the Department or the government would have to completely rethink how they develop, design and discuss policies. Firstly, we are sceptical that that would be the case and secondly, we find that any such effect is subject to the observations made in the previous paragraph. Any effect that is said to come from the disclosure of information simply because a matter is 'of interest' to the public can be disregarded. That is not a reason which would cause the Tribunal to order disclosure.

143. We accept that premature disclosure of detailed policy proposals could have a number of adverse consequences for the formulation or development of policy, for example enabling stakeholders to take action to lessen or avoid the impact of that policy, or to commission research to counter it.

144. We think that there is a low risk that disclosure of earlier drafts would affect the government's ability to persuade stakeholders that it was serious about tackling obesity, or that it was not taking discussions with them seriously because those measures did not appear in a particular draft. Stakeholders will understand the nature of a draft and, if necessary, with a short explanation from the Department, will appreciate that it is a snapshot of the process.

Detailed conclusions

145. For the reasons set out in the closed annex we have concluded that the *particular context* in which all the information contained in draft A was produced affects the meaning and effect of the content and this, in the light of ongoing policy formulation or development in obesity in general, tips the balance in relation to all the information contained in that draft document. We have therefore concluded that the public interest balance in relation to the whole of draft A is in favour of retaining the exemption and that it should be withheld.

146. We do not think that these considerations apply with the same force to all policy drafts. Draft A is in a unique position and we do not think the context of the other drafts tips the balance in relation to all the information in the same

way. We have therefore considered the public interest balance in relation to the information contained in drafts B-F on the basis of the specific information they contain, taking into account the context in which they were produced including the fact that they appear in a draft plan and that policy development was ongoing at the relevant point both in relation to childhood obesity in general and in relation to some specific policies.

147. In relation to Draft F, for the reasons set out in the closed annex we find that none of the harm highlighted by the Department would flow from the disclosure of this draft. We find therefore that there is very limited, if any, public interest in maintaining the exemption. On the other side, the public interest in disclosure is much diminished. Overall, we conclude that the interests in relation to Draft F are evenly balanced and therefore the public interest in maintaining the exemption does not outweigh the public interest in disclosing Draft F.

148. In making decisions about which information to disclose we have not had the benefit of further evidence or submissions addressing the specific information contained in the drafts. The parties were given the opportunity to provide this evidence and/or submissions but declined to do so and/or provided very limited further submissions. We have therefore proceeded on the basis of the evidence available to us, but we note that this did not specifically address all of the information contained in the drafts.

149. We have assessed the information in drafts B-E and categorised it as 'No longer live', 'Lower risk of harm' or 'Live and harm'. A more detailed version of our conclusions on each of these categories appears in the closed annex.

No longer live

150. This information relates to policies that were announced in the draft Plan or before the relevant date and where policy formulation or development was not ongoing in relation to any of these policies at the relevant date. We accept that policy formulation or development on obesity was ongoing in general at the relevant date.

151. The public interest in maintaining a safe space is much reduced in relation to these policies even though policy formulation or development work was still ongoing in this general area. There is a much lower risk of prejudicing policy formulation or development on these specific policies by, for example, revealing the government's hand. Any effect on the formulation or development of future policies flowing from the fear of disclosure flows from the FOIA itself.

152. We accept that the government may face scrutiny if changes have been made to these policies and may have to spend some resources dealing with that, but

we do not think that this weighs heavily in favour of maintaining the exemption.

153. We accept that the public interest in disclosure is reduced because these policies have been announced and therefore the ability for the public to have an impact on the steps the government takes is reduced. We accept that some of the information relating to these policies is contained in the Plan and therefore is in the public domain.

154. However, this is an issue which impacts on a large number of people as individuals and families and has a huge impact on the resources of the NHS. We find that there remains plenty of information in relation to these policies in the drafts that could contribute to a better-informed public debate. We find that the public debate would have been informed by the release of this information, because it casts light on how the policy that was announced was developed. We also take account of the more general points on transparency etc. and weigh them in the balance.

155. Overall, we conclude that the public interest in maintaining the exemption is outweighed by the public interest in disclosure in relation to the information that we have categorised as 'no longer live' in the table in the closed annex.

Lower risk of harm

156. This is information that relates to policies on which formulation or development was potentially still 'live' at the relevant date to a varying extent. Save for a few exceptions, dealt with in the closed annex, we have not heard any evidence or had submissions in relation to the extent of policy development or formulation in relation to the specific policies in this category at the relevant date. Again, subject to the same exceptions, nor have we had evidence or submissions about any particular harm which might result from the release of any particular information falling within this category, unless it is evidence or submissions that we have rejected.

157. Having considered all this information in detail and in its context, including any specific evidence relating to the specific policy, we conclude that disclosure of this information is highly unlikely to result in any of the harm identified by the Department.

158. There has always been a risk that information falling within the scope of s 35(a) would be disclosed, even while policy formulation or development was still live. This risk flows from the fact that this is a qualified exemption under FOIA. Any consequences that the Department has identified as flowing from fears of the risk of disclosure flow, in the Tribunal's view, from FOIA itself. We do not accept that the mere fact that part of a draft plan has been disclosed will have any chilling effect over and above any chilling effect caused by the FOIA itself.

159. The public interest in the disclosure of some of this information is reduced for the reasons set out in the closed annex, but we find that the public debate would have been informed to a greater or lesser extent by the release of all of this information.

160. Given the limited potential for harm and the significant impact of measures on the public in terms of the cost to the NHS and the number of individuals and families directly affected, we find that the public interest in disclosure outweighs the public interest in maintaining the exemption in relation to information falling within this category.

Live and harm

161. Information falls into this category because:

161.1. We heard specific evidence that policy formulation and development was ongoing in relation to this specific policy at the relevant date and we concluded that the nature of the information was such that disclosure of this level of detail could lead to the general harm to policy development identified by the Department; or

161.2. We heard no specific evidence on the state of policy formulation and development at the relevant time, but the policy had not been announced in the Plan and in the light of the ongoing formulation of obesity policy in general and the particular detail contained in this specific information we concluded that disclosure of this level of detail could lead to the general harm to policy development identified by the Department; or

161.3. It contains detail of particular policy proposals which were subject to ongoing development and formulation at the relevant time and we accepted that premature disclosure of this would cause the particular harm identified by the Department; or

161.4. It consists of high level less detailed proposals or background information but there was convincing evidence that the fact that the government had considered taking action at all in a particular area was not public knowledge and the evidence showed that the risk of harm arose simply from the disclosure that action was being considered.

162. In relation to information falling within this category we conclude that the public interest in maintaining the exemption outweighs the public interest in disclosure, despite the strong public interest in disclosure in this case. Our detailed reasoning on specific policies is set out in the closed annex.

Disposal

163. Draft A should be withheld in its entirety. Draft F should be disclosed in its entirety. A table in the closed annex identifies the category in which the information in drafts B-E falls and specifies whether this information should

be disclosed or withheld. The Department is to prepare a redacted version of drafts B-E for disclosure in accordance with the annex.

164. Our decision is unanimous. We record that in accordance with normal practice a copy was supplied to the Department in draft in case the tribunal was proposing to disclose inadvertently any information which should not be disclosed at this stage.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 22 February 2019
Promulgated: 26 February 2019