IN THE FIRST-TIER TRIBUNAL **Case No. EA/2018/0251**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50708971
Dated: 7 November 2018

Appellant:	**Ms Geraldine Hackett**
Respondent:	**The Information Commissioner**
Second Respondent:	**Department for Education**
Dates of hearing:	**17 - 18 June and 10 July 2019, at Field House, London**
Date of decision:	**25 November 2019**

Before

Anisa Dhanji
Judge

and

Alison Lowton
Paul Taylor
Panel Members

Representation:

For the Appellant: Sam Fowles, Counsel, for 17-18 June; the Appellant in person for 10 July.
For the Respondent: Elizabeth Kelsey, Counsel
For the Second Respondent: Christina Michalos QC, Counsel

Subject matter

FOIA section 36(2)(b)(i) and (ii), and 36(2)(c) - whether disclosure would or would be likely to inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation, or otherwise prejudice the effective conduct of public affairs.

Section 2(2)(b) whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

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SUBSTITUTED DECISION NOTICE

This appeal is allowed in part.

We direct that within 30 days of this decision being promulgated, the DfE must disclose to the Appellant, all the disputed information with the exception of:

1. Items 20, 21 and 22 of the closed bundle; and

2. The personal data identified at paras 172-173 of the decision.

The 30 days is to allow for the possibility that the DfE may appeal this decision. Earlier disclosure may defeat the purpose of such appeal.

Anisa Dhanji
First Tier Tribunal Judge

IN THE FIRST-TIER TRIBUNAL
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REASONS FOR DECISION

Introduction

1. This is an appeal by Geraldine Hackett (the "Appellant"), against a Decision Notice ("DN"), issued by the Information Commissioner (the "Commissioner"), on 7 November 2018.

2. It concerns a request made by the Appellant on 11 September 2017 (incorrectly referred to in the DN as 2018), to the Department of Education ("DfE"), under the Freedom of Information Act 2000 ("FOIA"), for information about The Education Fellowship Trust ("TEFT").

3. TEFT is a multi-academy trust, which, at the relevant time, comprised 12 academies, educating approximately 6,500 students. TEFT began administering schools in 2012. By 2014, it was experiencing a number of problems.

4. The Appellant is a journalist specialising in education, and has been investigating why these problems occurred, and why they were permitted to continue for more than three years.

5. The DfE refused her request, citing various exemptions in FOIA. Following an internal review requested by the Appellant, on 21 February 2018 (the "internal review date"), the DfE upheld its previous position and maintained its refusal.

The Request

6. The Appellant's request was made on the following terms:

> *I would be grateful if you could supply information that sets out the background checks carried out on Johnson Kane, the former Chief Executive of the Education Fellowship Trust. Can you let me know the checks and results of the checks carried out by the Department for Educatíon: the Education Skills Funding Agency (ESFA) and the regional commissioners? Can you supply communications between the regional commissioners and the Education Fellowship from December 2016 to the present (11/09/2017). Could you supply correspondence and communication between the DfE; the Education Skills Funding Agency and the regional commissioners between January and the end of March 2017 with regard to any discussions or proposals that deal with measures to tackle poor performance by the Education Fellowship Trust, its trustees, senior management and its schools.*

7. For the purposes of this appeal, the parties have approached the request as being comprised of two parts. We have adopted their approach, except that we have divided the second part into two sub-parts:

   (1) Information relating to Johnson Kane ("the Kane Information") comprising:

(a) The background checks on Mr Kane carried out by DfE, the Education Skills Funding Agency ("ESFA"), and the Regional School's Commissioners ("RSC") ("the Background Checks"); and

(b) The results of the Background Checks ("the Results").

(2) Information relating to TEFT ('the Trust Information") comprising:

(a) Correspondence between the DfE, ESFA, and the RSC from January 2017 to the end of March 2017, relating to any discussions or proposals about measures to tackle poor performance by TEFT, its trustees, senior management and its schools. ('the Performance Information"); and

(b) Correspondence between the RSC and TEFT from December 2016 to 11 September 2017, i.e. the date of the request ("the Correspondence").

8. DfE refused the request, citing the exemptions in sections 36(2)(b)(i) and (ii), and 36(2)(c) of FOIA, on the basis that disclosing the disputed information would inhibit the frank provision of advice or exchange of views, or otherwise prejudice the effective conduct of public affairs.

9. DfE has also relied on section 40(2) (personal data of third parties), in respect of some of the disputed information, and section 42 (legal professional privilege), in respect of 3 items of information.

Complaint to the Commissioner

10. The Appellant complained to the Commissioner about DfE's refusal of her request.

11. The Commissioner found, as set out in her DN, that sections 36(2)(b)(i) and (ii), and 36(2)(c), were engaged in relation to the entirety of the disputed information, and that the public interest in maintaining the exemption outweighed the public interest in disclosure. Accordingly, the Commissioner held that the disputed information was exempt from disclosure.

12. Having reached this finding, the Commissioner did not go on to consider whether any other exemptions were also engaged.

Appeal to the Tribunal

13. The Appellant has appealed against the DN under section 50 of FOIA.

14. The scope of the Tribunal's jurisdiction in dealing with an appeal from a DN is set out in section 58(1) of FOIA. If the Tribunal considers that the DN is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, she ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

15. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

16. We have considered all the material before us, and will refer to it as needed, but will not attempt to refer to all of it, nor indeed to every turn of argument.

The Disputed Information

17. In line with the Supreme Court's decision in Bank Mellat v Her Majesty's Treasury [2013] UKSC 38, we will say as much as we reasonably can about the disputed information in this decision without defeating the purpose of this appeal.

18. We have also kept in mind the Court of Appeal's guidance in Browning v Information Commissioner and the Department for Business, Innovation and Skills [2014] EWCA Civ 1050, as regards closed material. in particular at para 35 where it said:

> *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."*

19. During the course of the hearing, closed sessions were limited to correspondence about Mr Kane's non-attendance, some aspects of the oral evidence of DfE's witness, Joanna Thomas, and cross examination of her by the Commissioner, and to closed submissions by TEFT and the Commissioner. In all cases, the content of the closed sessions was "gisted" for the Appellant.

20. The disputed information comprises some 101 documents. A spreadsheet listing these with short descriptions of the material has been provided to the Appellant. Most of it comprises emails and other communications within DfE (including RSC and EFTA), or between DfE and TEFT.

21. The main closed bundle comprises of some 367 pages. Pages 1 to 48 are redacted copies of the following items in the main open bundle:

- Response and supporting documents including QP's opinion and a table setting out a list of documents proposed to be withheld-open bundle pages 101-144
- Email from the Commissioner to the DfE dated 13 September 2018 (open bundle pages 145-146)
- Email from DfE to the Commissioner dated 3rd October 2018 (open bundle page 147)
- Email from the Commissioner to DfE dated 9 October 2018 (open bundle page 148)
- Email from the DfE to the Commissioner dated 12 October 2018 (open bundle page 149).

22. Pages 50 onwards contains the disputed information:

- Items 1-5 (pages 50-67) relate to the Kane Information.
- Items 6-101 (pages 68-367) relate to the Trust Information.

23. Following the hearing in June, DfE submitted a further open and closed bundle. This followed directions for (amongst other things), the Appellant to be provided with material in the first closed bundle for which there could be no good reason to withhold, or to limit the redactions to what was necessary. On this basis DfE disclosed additional material to the Appellant in respect of items 11, 71 and 107 of the main closed bundle, as well as pages 126 to 129 in the main open bundle, subject to redactions for personal data.

24. DfE also provided further news articles relating to Mr Kane.

Statutory Framework

25. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.

26. The duty on a public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions.

27. As already noted, DfE has relied on the exemptions in sections 36(2)(b)(i) and (ii), and 36(2)(c) of FOIA. It has also relied on section 40(2) and section 42 in respect of some of the information. We will consider section 36 first.

Section 36

28. In so far as is relevant, section 36 of FOIA provides that:

> *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 –*
>
> *(2)(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*
>
> *(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*

29. DfE has relied on the second limb, namely, "would be likely to". This is a lower standard than "would". It means that the chance of prejudice must still be significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur

30. The DfE provided the Commissioner with a spreadsheet containing 101 items of information which it says came within the scope of the request. It has annotated this spreadsheet with the relevant limb(s) of section 36 which it says applies to each item of information.

31. Section 36 is a qualified exemption. Pursuant to section 2(2)(b), information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This balancing exercise must be undertaken as at the internal review date.

32. Section 36(5) explains what is meant by a qualified person ("QP"). For a local authority within the meaning of the Local Government Act 1972, including county councils and district councils, the QP is the Monitoring Officer or the Chief Executive. For DfE, it is a relevant Minister.

Factual Background

33. Academy schools in England are directly funded by the DfE. They are independent of local authority control. The DfE is also responsible for the overall administration of academy schools, and where necessary, intervening to remedy problems.

34. It is fair to say that the "academies policy" has been subject to significant criticism, as to both its principle and its implementation.

35. ESFA is an executive agency of DfE. It regulates academies and other educational institutions, and intervenes where there are difficulties, such as a risk of failure, or where there is evidence of mismanagement of public funds.

36. RSC is also part of DfE and is responsible for, amongst other things, intervening when academies and free schools are underperforming.

37. A multi-academy trust ("MAT"), is a group of academies under a shared structure. A MAT must comply with the terms of the Academies Financial Handbook, their articles of Association, and their Funding Agreements, amongst other things.

38. TEFT is a MAT. It opened its first school in October 2012, and had opened 12 schools within its first year of operation, with responsibility for approximately 6,500 students in Northamptonshire, Wiltshire, and Berkshire.

39. In December 2013, ESFA carried out a routine review of TEFT's annual accounts. That review highlighted significant weaknesses in financial management and governance. It resulted in ESFA issuing a Financial Notice to Improve ("FNtI"), in April 2014. These are issued where ESFA considers that an Academy Trust must improve "financial management, control, and governance". An FNtI sets specific targets for improvement.

40. ESFA rescinded that FNtI in 2015, when it considered that TEFT had met the conditions of the FNtI.

41. On 12 June 2015, Ofsted issued a report on the management of TEFT and the Academies it administered. It found that there was no clear record of improvement in the Academies, and that standards were unacceptably variable. In around three quarters of the Academies, standards were "poor". Ofsted attributed TEFT's failings, in part, to changes in leadership and to poor management of TEFT's finances.

42. In December 2015, the RSC for the North West London and South Central regions issued a Termination Warning Notice ("TWN") to one of TEFT's Academies, Blackthorn Primary.

43. In January 2016, it issued a series of Pre-Termination Warning Notices ("PTWN"), to other TEFT academies, including Olympic Primary, Ruskin Junior, Thorplands Primary, Warwick Primary, Rushden Community College and Wrenn Academy.

44. In the summer of 2016, following Ofsted inspections that found a number of schools to be inadequate, PTWNs were issued to Blackthorn, Ruskin Junior and Rushden Community College, Later, a PTWN was issued to Wrenn Academy.

45. PTWNs and TWNs are official letters, setting out DfE's concerns about the manner in which an Academy Trust is managing its affairs. They are a formal step in the process of DfE's intervention. These notices set out areas for improvement which, if not addressed, could lead to the termination of an Academy Trust's administration of the schools in question. In total, 6 PTWNs and 4 TWNs were served in respect of TEFT's Academies.

46. In 2016, following the poor OFSTED report of June 2015, and also, whistleblowing allegations about the governance at TEFT, ESFA undertook an investigation. This led to ESFA issuing a second FNtl to TEFT on 22 August 2016.

47. One of the main ways that the DfE intervenes in cases of underperforming Academies, when other measures fail, is to transfer them to another Academy Trust. The process of transferring schools from weak to strong providers is known as re-brokerage. It involves terminating an Academy's funding agreement with the existing Academy Trust, and entering into a new funding agreement with the new provider.

48. In late 2016, TEFT and DfE started negotiating the potential dissolution of TEFT and the re-brokerage of its academies. In March 2017, it was publicly announced that TEFT would transfer all 12 academies to new sponsors.

49. In May 2017, Ofsted undertook an inspection of Wrenn School, one of the academies administered by TEFT. The inspector noted that:

> *"Following the last inspection, TEFT failed to produce a statement of action to address how it would support the areas for improvement identified at the last inspection. Nor have representatives from the trust taken up the invitation to attend local governing body meetings".*
>
> *"TEFT has failed to provide sufficient additional and effective support and challenge, over and above that provided from within the school and the appointment of the principal. The trust has not helped the school enough to make necessary improvements to raise pupils' outcomes."*

50. The problems at TEFT received national media attention during this period of time, with articles on the BBC News website and in other media outlets, including the Times Educational Supplement, the Sunday Times, and the Guardian.

51. DfE says that its key priority was to ensure that all the children at these academies received the best possible education and that it continued to work closely with TEFT to ensure disruption for pupils was kept to a minimum.

The Appeal Hearing

52. An oral hearing took place over 3 days. As already noted, some parts of the hearing took place in closed sessions. The Commissioner had indicated that she would not be attending, but shortly before the hearing, she informed the Tribunal that in fact, she would attend, and be represented. The Appellant was represented for the first two days, but not the third.

53. Prior to the first day of the hearing, DfE put the Tribunal and parties on notice that it intended to raise a preliminary matter concerning the witness statement of Mr John Mills, lodged by the Appellant.

54. DfE's position on Mr Mills' evidence was that:

- The entirety of the statement concerns Mr Johnson Kane and makes serious allegations against him, including that he had lied extensively.
- The allegations engage Mr Kane's Article 8 rights to a private and family life (which include a person's reputation).

- Mr Kane is not a party to this appeal, nor is he represented. An individual who is the subject of a level of criticism sufficient to trigger protection under Convention rights to procedural fairness, has to be given proper notice of the case against him: W (A Child) (Care Proceedings: Non Party Appeal [2017] 1 WLR**.** A failure to do so may render a process intrinsically unfair and fall short of the standard of fairness to which those affected were entitled, in the context of both article 8 and the common law.

55. On this basis, DfE submitted that the statement of Mr Mills was inadmissible and/or irrelevant, and that the Tribunal should disregard it. Alternatively, if it was admitted, the Tribunal should treat it as being of such little weight (absent Mr Kane and the veracity of the allegations being tested in cross examination), that it should be disregarded. The allegations were, in any event, irrelevant to the matters in issue.

56. The Commissioner and Appellant both opposed the application.

57. Prior to the hearing, DfE had said that it would endeavour to contact Mr Kane so that he had an opportunity to say if he wanted to attend the hearing or otherwise to provide a response to Mr Mills' statement.

58. During the first day of the hearing, we were asked to consider whether the hearing should be adjourned to allow Mr Kane an opportunity to attend. However, in response to our questions, it became apparent that DfE knew more about Mr Kane's position than it had first indicated. We were then shown, in a closed session, ("gisted" for the Appellant afterwards), correspondence said to have been written on Mr Kane's behalf, explaining the reasons for his non-attendance. On the basis of this information, we were satisfied that his attendance would not likely be secured by an adjournment. The correspondence received by DfE also said that the events Mr Mills refers to in his witness statement, occurred some 30 years ago, and that Mr Kane did not have any recollection of Mr Mills.

59. Clearly, Mr Kane had read the allegations that Mr Mills had made in his statement. He had the option of attending through a representative, or providing a sworn witness statement, but chose not to do so. In these circumstances, we ruled that to admit the evidence of Mr Mills (which we will summarise below and which we considered to be relevant), was not unfair, and did not breach Mr Kane's Article 8 rights. As to the weight to be given to Mr Mills' evidence, we keep in mind that his evidence was tested in cross-examination, and that we were able to form a view as to the reliability of his evidence. We also note, however, that the matters he addresses occurred a very long time ago and that, together with the fact that because of Mr Kane's absence, DfE was not able fully to challenge Mr Mills' evidence, means that we attach less weight to his evidence than we might otherwise have done. However, concerns about Mr Kane's background does not come just from Mr Mills' evidence. It also comes from other material before us and from press articles to which we have been referred.

60. We wish to make it clear that we make no findings about whether the allegations made by Mr Mills about Mr Kane are true. We find simply that there appear to be legitimate questions about Mr Kane's career history and conduct.

Witness Evidence

61. We heard evidence from two witnesses, John Mills on behalf of the Appellant, and Joanna Thomas on behalf of the DfE. Ms Thomas gave evidence over the first two days of the hearing on 17 and 18 June 2019. She also provided a further witness statement dated 8 July which was limited to a particular point the panel had previously raised.

62. Both had prepared witness statements, which they adopted as their evidence in chief. In the case of Ms Thomas, two statements were provided and there were open and closed versions of each. Both witnesses were examined and cross-examined and we also asked them a number of questions.

Mr Mills

63. Mr Mills says that he was the Group Personnel Director at the British Airports Authority (later BAA plc), from 1987 to 1997. He was responsible to the Chairman and/or the Chief Executive for senior management appointments.

64. Mr Kane was recruited in 1987 (a few weeks before Mr Mills was appointed as Group Personnel Director), by the Managing Director of British Airports Service Ltd ("BASL"). BASL was a wholly owned subsidiary company responsible for providing functional advice and services to the airport operating companies. Mr Kane was appointed as Commercial Services Director at BASL, with responsibility for advising and assisting the airports to develop retail/shop facilities and car parking.

65. Mr Mills says that he was aware of claims that Mr Kane had been a member of the BAA main board, and had been appointed to direct or oversee the privatization of the British Airports Authority. He says that those claims are wholly untrue. The only Board of which he was a director was that of the services company, BASL. Mr Mills says that Mr Kane had virtually no involvement with privatisation work.

66. During his first few months as Group Personnel Director Mr Mills says he became suspicious about claims concerning Mr Kane's previous career. Checks were made of the information from the search consultants used by BASL to recruit Mr Kane and, also, the application papers completed by him.

67. Mr Mills alleges that these inquiries revealed that Mr Kane had lied extensively about several matters - including naming a secondary school he had not attended, and falsely claiming exam results that he had not achieved. Also, Mr Kane had claimed to have been a senior manager with the John Lewis Partnership. This was denied by John Lewis Partnership which said that he had never been a senior manager, but had been employed as a junior sales person.

68. Mr Mills says he advised the Managing Director of BASL and Jeremy Marshall, the then Chief Executive of BAA of these matters, and recommended appropriate action. He says that the eventual outcome was an instruction by Mr Marshall that there was no need for any further action to be taken. Whilst the Managing Director of BASL and Mr Mills were concerned about this decision, they acquiesced due to the pressures of the company's flotation.

69. Mr Mills says that Mr Kane had been with British Airports Services Ltd for around 18 months when certain wrongdoings emerged. This was then subject to an internal investigation. Following internal discussions, Mr Kane was allowed to resign on certain conditions.

70. Mr Mills says that following Mr Kane's departure from BAA, new allegations were made which would, if proven, have resulted in his dismissal.

71. At the hearing, it was put to Mr Mills that Mr Kane had said that he did not remember him. Mr Mills was incredulous. He also said that he remembered the matters he had

testified to very clearly because he had gone over Mr Marshall's head and this had had career consequences for him.

Ms Thomas

72. Ms Thomas is a Deputy Director in the North West London South Central RSC Office leadership team. She has held that position since May 2018. Prior to that, she had been the Deputy Director of the South West RSC Region for over two years.

73. Her team is responsible for working with schools wanting to convert to academy status, identifying and implementing sponsored academy solutions for inadequate maintained schools, and intervening in the case of under-performing academies.

74. In relation to the Appellant's request for information, she chaired the internal review but was not involved with the request prior to that.

75. She says that once the information coming within the scope of the request was identified, officials reviewed the information in order to determine whether any exemptions applied. They concluded that the release of the information was exempt under section 36. She says that to obtain the ministerial sign-off regarding the perceived prejudice, a submission was drafted to the Minister.

76. She says that before any submission seeking a section 36 opinion is submitted to a Minister, it is cleared by the appropriate Deputy Director. If they endorse the recommendation to withhold any information, their role also involves ensuring that the recommendation going to the Minister is considered and reasonable. A member of the department's FOI team also checks the submissions from an FOI perspective. The submission put to the Minister has been provided as part of the closed bundle and identifies the prejudice that DfE says would arise if the disputed information were to be disclosed.

77. The QP in this case was Lord Theodore Agnew, Parliamentary Under Secretary for the School System. Lord Agnew was appointed to that position on 28 September 2017, and had previously served as a non-executive board member at the Ministry of Justice and the DfE, where he was chair of the DfE's Academies Board from 2013 to 2015. Lord Agnew was previously a member and director of the Inspiration Academy Trust, so had direct experience of managing academies, including re-brokerage.

78. Ms Thomas says that Lord Agnew has extensive experience in reviewing section 36 submissions. After considering the submissions, he reached the conclusion that disclosure would be likely to prejudice the free and frank provision of advice or exchange of views or would otherwise prejudice the effective conduct of public affairs.

79. As to the prejudice relied upon, Ms Thomas says that in the event of failures, as in the case of TEFT, DfE needs to engage Academy Trusts and stakeholders in complex and sensitive discussions and negotiations, to determine the appropriate intervention. It is essential that DfE officials, as well as other stakeholders, such as MAT executives and school principals, feel able to discuss a range of issues freely without worrying about the public presentation of these discussions.

80. Whilst the transfer of the TEFT Academies has now concluded, she says that there are a number of outstanding issues. The solvent closure of TEFT has not yet been completed, pending the publication of TEFT's final accounts. Following the

publication of the accounts, TEFT will remain residually open for an additional three months, managed by a solicitor, to settle any outstanding debts or claims that may arise. Since the closure of TEFT is still ongoing, release of the disputed information even as at the dates of the hearing, could still have a prejudicial effect on its solvent closure.

81. Ms Thomas says that DfE recognises the public interest in transparency. There is public interest in releasing the information because it demonstrates that RSCs closely scrutinise governance arrangements for Academy Trusts and monitors their performance where there are concerns. Greater clarity about the process of intervention in academies may benefit accountability, improve trust and strengthen public debate. To this end, DfE publishes key documents relating to intervention, such as the PTWNs and FNTLs. Publishing such documents helps to increase public confidence in the Government's ability to hold MATs to account. However, the public interest in disclosure is outweighed by the negative impact of releasing the disputed information on the re-brokerage process, namely that it could cause negotiations regarding the transfer of schools to fail.

82. The correspondence comprising the disputed information involves the free and frank exchange of views between officials for the purpose of providing advice to ministers. Release of the information could prejudice the future ability of officials to engage in these conversations, necessary for proper advice and negotiations to be conducted. Disclosure could mean that information is not properly recorded in the future, due to fear of such disclosure. This would undermine the ability of officials and stakeholders to fully explore and discuss issues on finding appropriate solutions, and limit room for bespoke outcomes. Moreover, if release of the disputed information resulted in adverse public reaction, it could close off more appropriate options in the future that would otherwise be explored, and would undermine the credibility of RSCs and ESFA.

83. She says that there is a vital need to protect the space in which officials deliberate on potential interventions and negotiate to deliver them. In this case, where the Academies were transferred, officials needed to develop plans with potential Trusts, sharing sensitive information involving both financial and performance issues. It is crucial and in the public interest that officials are able to engage in these conversations freely and candidly, without fear of disclosure. Disclosure or even the risk of disclosure can have an impact on the ongoing confidence in the relevant academies and the educational system.

84. Disclosure of the disputed information would not only have affected this case at the internal review date, but would likely prejudice the effective conduct of public affairs in the future, as it would remove the space within which officials are able to discuss options and delivery freely and frankly. A robust and fair decision-making system relies on considering all points of view fully and thoroughly before reaching a reasoned conclusion. To do this, all parties should be able to speak freely and frankly to ensure that issues are debated widely and that decisions are based on broad and balanced evidence. If there is a risk that sensitive discussions may be opened up to public scrutiny, departmental officials and key stakeholders are very likely to be reluctant to enter openly into the discussion and subsequent decision-making process, resulting in a reduction in quality of the final decision. Ms Thomas says that in her professional opinion, this is a genuine and serious risk in this sensitive sector.

The Respondents' Position

85. Although, as expected, the arguments have been largely led by DfE, the Respondents' positions on the substantive issues are largely aligned, and it would be appropriate therefore, to deal with them as one.

86. To a large extent, DfE's position has been summarised above, through Ms Thomas' evidence.

87. DfE says that there is no reason why the Tribunal should conclude that the QP's opinion was not reasonable. The Tribunal should therefore move on to consider the public interest arguments for and against disclosure.

88. It also says that a review of the disputed information clearly supports a conclusion that the public interest in withholding it outweighs any public interest in disclosure. In particular:

- Present and future stakeholders (including school and college principals) must feel free to discuss matters openly and frankly with the DfE without fear of later publication.

- A robust and fair decision-making process relies on full and accurate information being provided and the best advice available, as well as full consideration of all options. If officials and key stakeholders feel that their exchanges would enter the public domain, the risk of a chilling effect is substantial. There is real risk of less, candid views being expressed in future and a serious inhibition being placed upon those being asked for information, views and advice in future.

- Disclosure would be likely to prejudice DfE's ability to deal effectively with handling significant delivery and business issues, in this case the cancellation of a master funding agreement and the subsequent re-brokerage of the TEFT's schools.

- Disclosure would also be likely to disrupt and delay the re-brokerage of the schools which were live and ongoing issues. By analogy with decisions under section 35 (formulation of government policy), it is the principle that ministers and officials are entitled to time and space (and in some cases considerable time and space) in the development of policy as expressed in Department of Education & Skills v Information Commissioner & The Evening Standard (EA 2006/0006), is equally applicable here. Time and space should be accorded respect in the case of live and developing issues.

89. On the facts of this case and in the light of the sensitivity of the information in issue, the public interests in transparency do not outweigh these substantial public interest arguments. This is not a case where a general appeal as to chilling effect is made; this is very specific due to the particular nature of the sensitivity of the information in this sector.

The Appellant's Position

90. The Appellant has, of course, been constrained in her arguments because of not having seen the disputed information. Her arguments have therefore been generic, rather than based on the particulars of the disputed information.

91. She explains that the reason for her request relates to the poor performance of TEFT. TEFT began administering schools in 2012. DfE were long aware of a number of problems at TEFT including low standards and financial irregularity. These problems were not resolved. In March 2017, TEFT applied to have the schools it administered re-brokered to other sponsors. The Appellant wants to know why the problems with TEFT occurred, and why they were permitted to continue or occur again for more than 3 years.

92. She says that DfE appear to have applied the same analysis to all the disputed information, but they should have addressed each class of information on its individual merits. She also says that in the DN, the Commissioner's public interest analysis is essentially a restatement of the prejudice analysis.

93. As regards the Kane Information, the Appellant says that as part of her investigation, she has obtained evidence indicating that the published information about Mr Kane, the Chief Executive of TEFT at the relevant time, contains a number of claims that are untrue.

94. The Appellant says that the Kane Information cannot possibly fall within section 36, given that it is factual information, not advice. Neither of the Respondents have explained how the section 36 exemptions apply to the Background Checks. The disclosure of due diligence cannot possibly prejudice the conduct of public affairs. It is also not clear how disclosing the Results would inhibit the provision of advice or the free and frank exchange of views. If the QP found that section 36 did apply to the Kane Information, then his opinion is not reasonable, and the Commissioner was wrong to find that it was.

95. She says that it is "absurd" to suggest that disclosure of the Kane Information would make civil servants refrain from undertaking due diligence. While it may be that the individuals who compiled the Background Checks did not expect them to be made public, this is not a sufficient reason to apply an exemption.

96. In relation to the Trust Information, the Appellant notes that the Tribunal must decide whether the conclusions reached by the QP were reasonable. The Tribunal is entitled to reach its own view as to the likelihood of prejudice: Guardian Newspapers Ltd and Heather Brooke v IC and BBC 2007 WL 9362172 (at para 88).

97. The Appellant further says that section 36 has been incorrectly applied to the Trust Information as if it were a class-based exemption, when it is, in fact, a prejudice-based exemption. Also, there has been no analysis or supporting evidence as to whether the prejudice identified is likely to occur. The Respondents' analysis is limited to the assertion that if information of this type is disclosed, it may cause officials to be less candid in the future. Their approach seems to be that any discussions between officials about matters of public policy, if disclosed, would make officials less candid in the future. This is an entirely improper approach to section 36, as the Commissioner's own guidance on section 36 points out. The proper approach is to identify prejudice in relation to specific information in the specific context surrounding it: CAAT v IC (EA/2007/0040) at para 81, and CAAT v IC (EA/2011/0109) at para 51. The Respondents have failed to do this.

98. The Appellant says that neither the QP nor the Respondents undertake any analysis of why this particular information would create a chilling effect. They also neglect the fact that there is no evidence that disclosure of information of this kind creates a chilling effect and, indeed, independent research (to which the Tribunal has referred in the past), indicates that no such effect exists: Department of Health v Information Commissioner et.al. (EA/2011/0286 & 0287). It cannot be reasonable to reach a conclusion for which, not only is there no specific supporting analysis or evidence, but where the available evidence actually points in the contrary direction.

99. The Respondents have also not undertaken any analysis of why the disclosure of correspondence between January 2017 and March 2017 would have a negative effect on the re-brokering of the schools. It was already public knowledge that a number of TEFT schools had substantial problems before March 2017. It is difficult to fathom how discussions of these problems could have a negative impact on the

process of new sponsors taking on the schools (presumably in full knowledge of their problems).

100. Disclosure of the disputed information, and the subsequent public debate and scrutiny would, more likely, have had a positive impact on the re-brokering of the remaining schools. The decision to permit TEFT (and Mr Kane in particular), to administer schools clearly did not have a happy ending. Similarly, the DfE's supervision of TEFT ultimately failed. The best way to avoid these failings recurring is to examine them in the cold light of day through a public process.

101. The QP was Lord Agnew, Parliamentary Under-Secretary of State for the School System (with responsibilities for Academies). Prior to taking that role, Lord Agnew was Chairman of the DfE's Academy Board. In that role he would have been alerted to the problems at TEFT in at least 2014 (when the first FNTL was issued). He therefore had a personal interest in this matter. Lord Agnew was clearly conflicted when reaching his decision. The decision was therefore not reached in a reasonable manner.

102. Further, or in the alternative, the Appellant says that the public interest in disclosure clearly outweighs the public interest in maintaining any of the exemptions relied upon.

103. The Respondents have considered the public interest in disclosure only in the light of a general public interest in scrutiny of public bodies. The public interest in disclosure, while encompassing this, goes beyond it. This matter concerns specific failings on the part of TEFT, and potentially, those with the duty to supervise it. In particular it appears that Mr Kane's CV, which was published by TEFT, contained more than one substantial false claim. There were early and indications that TEFT was failing, yet no action was taken by the DfE to re-broker the schools until 2017. This was despite both OFSTED reports and the DfE's own reports indicating substantial failings on multiple occasions.

104. This matter concerns the education of children. The Respondents rely on the public interest in the DfE ensuring that pupils receive an "excellent" standard of education. It is clear that the majority of pupils at TEFT schools were not receiving an excellent standard of education. Many were receiving a "poor" standard of education. Pupils, parents, and the public in general are entitled to understand why this occurred.

105. There is a strong public interest in accountability and transparency of decision-making bodies, including the reasons for those decisions. In the present case, that interest is in understanding the decisions that led to the appointment of Mr Kane, and the decision to permit TEFT to continue to administer schools, despite multiple failures over a course of years.

106. TEFT and DfE are both in receipt of substantial public funds. The academies' policy as a whole is not without controversy. Understanding the decision-making behind a failing Academy Trust, why it was permitted to continue to fail for so long, and how a man with a number of questionable claims on his CV was appointed to a leadership role, are all important to allowing the public to understand, engage with, and (where necessary) critique the academies' policy. There is a particular public interest in the disclosure of information that promotes public engagement with the democratic process.

107. There is also a particular public interest in disclosure where there has been (or may be revealed) mismanagement or illegality on the part of public officials. If it transpires that Mr Kane was not truthful in his CV, this may disclose a cause of action. The Background Checks may also indicate mismanagement.

108. As regards section 40, the Appellant accepts that the Kane Information is personal data. This is not a barrier to disclosure, however, because disclosing the information is fair. The assessment of fairness entails a consideration of the nature of the data, the identity of the person to whom the data is to be disclosed, and the possible implications for the data subject. Where the data subject is a public employee, the calculation of fairness is not the same as for a private citizen. A public official, particularly one in a position of leadership, can reasonably expect a greater degree of scrutiny. Further, individuals taking senior leadership positions in public bodies will have a reasonable expectation that certain personal data may be disclosed.

109. The impact on Mr Kane will be minimal. It is entirely to be expected that background checks will be conducted when an individual takes a high-profile public job. It will not reflect positively or negatively on Mr Kane to confirm which checks have taken place.

110. As to the Results, if they show that Mr Kane has been truthful in his public CV, then there can be no prejudice to Mr Kane (indeed, there must be some degree of vindication). If the results show that Mr Kane's CV is inaccurate then while disclosure would certainly prejudice Mr Kane, it must be within his reasonable expectations that on his deception being uncovered, the truth would be disclosed.

111. It is in the public interest that parents have access to information that refers to concerns about the adequacy of the Academy Trust that is running their children's schools. It is in the public interest that the professional background of the CEO of an Academy Trust is checked and made known.

Findings

112. We will begin with section 36. We will only go on to consider section 40 and 42 (to the extent relied upon), if we find that the disputed information is not exempt under section 36.

113. The first question is whether section 36 is engaged in relation to the disputed information. Would disclosure be likely to give rise to the prejudice claimed, i.e., would it be likely to inhibit the frank provision of advice or exchange of views or otherwise prejudice the effective conduct of public affairs? This is an assessment that must be made as at the internal review date (21 February 2018).

114. There must be some causal relationship between the potential disclosure and the claimed prejudice. It is not necessary to show that the prejudice would be significant (although the extent of the prejudice is relevant to the public interest balance). However, disclosing the information must have "a very significant and weighty chance" of causing prejudice that is "real, actual or of substance" Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and EA/2005/0030); Department for Work and Pensions v the Information Commissioner and FZ [2014] UKUT 0334 (AAC); and R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin). There is, therefore, a *de minimis* threshold which must be met.

115. DfE has identified a number of specific areas of prejudice that it says would be likely to arise from disclosure. In the case of section 36, the issue of whether the claimed prejudice is likely to occur is, in the first instance, a matter for the QP. The exemption in section 36 is unique in that it requires the opinion of a QP to the effect that prejudice referred to in section 36, would, or would be likely to occur, from disclosure.

116. DfE has provided the opinion of Lord Theodore Agnew, Parliamentary Under Secretary for the School System. There is no dispute that he is indeed a QP.

117. The QP's opinion must be reasonable. When assessing reasonableness, it is necessary to consider all relevant factors, including the nature of the information, and the QP's knowledge of, or involvement in, the matters relied upon.

118. Guidance on assessing reasonableness has been given by the Upper Tribunal ("UT"), in IC v Malnick and ACOBA [2018] UKUT 72 (AAC). The UT explained in particular that section 36 involves a two stage process:

- The question of whether disclosure would or would be likely to give rise to the claimed prejudice is the "threshold question".

- The Tribunal is not required to determine whether prejudice will or is likely to occur, that being a matter for the QP.

- The QP is not called on to consider the public interest for and against disclosure. The QP is only concerned with the occurrence or likely occurrence of prejudice.

- However, the QP's opinion as to the occurrence or likely occurrence of prejudice must be reasonable. This means substantively reasonable and not procedurally reasonable.

- The public interest is only relevant once the threshold question has been crossed.

- When judging the public interest balance, the Commissioner (and by implication, the Tribunal on appeal), must form an independent assessment of the public interest balance, albeit taking into account the QP's opinion and evaluating the weight to be attached to it.

119. As to whether the opinion of the QP in this case was reasonable, the Appellant says that the QP's opinion is tainted by his close involvement with the academies' policy and his involvement in re-brokering schools, including some of those in issue in this case. The Respondents say, and we agree, that it is clear that Parliament has chosen as QPs, people who hold senior roles in their public authorities in order that they have the required knowledge of the workings of the authority. It is inevitable, therefore, that they will often be closely involved in the subject matter of an information request, and their opinion cannot be discounted or disregarded on that basis.

120. However, we have found it unhelpful that the QP's opinion here is as brief as it is. It does no more than state that in the QP's opinion, disclosure of the information (which is not specified), would be likely to have the effect set out in section 36(2)(i) or (ii). It then goes on simply to rely on section 36(2)(c) without stating whether it was being said that disclosure "would" or "would be likely to" prejudice the effective conduct of public affairs. There is no attempt to explain the prejudice, nor to cross refer to any submissions or analysis undertaken by DfE.

121. We do not find that these matters mean that the opinion was not reasonable. Clearly submissions had been put to the QP. However, there is no indication as to what he might have agreed with or not, or the importance or otherwise that he attached to particular factors. We consider that where the basis of his opinion is not set out, it limits the weight that we can properly attach to the QP's opinion when undertaking the public interest balancing exercise.

122. We turn now to consider the public interest for and against disclosure. We will do so first, in relation to the Kane Information, and then in relation to the Trust Information.

123. We canvassed with the parties whether it might be workable to make findings based on categories of information rather than individual items of information. However, it became evident quickly that such an approach would not greatly assist, and that it was necessary to consider each item of information separately, which we have done.

The Kane Information

124. In September 2013, Johnson Kane was appointed Chief Executive of TEFT. Prior to this, he was a Director of TEFT. He also held the position of Vice-Chair and Joint Chief Executive along with Sir Ewan Harper. Upon Sir Ewan's resignation, Mr Kane became TEFT's sole Chief Executive. That is the position he held at the date of the request.

125. As already noted, the Kane Information comprises the Background Checks, and the Results of those checks. The Appellant has argued that the Kane Information is simply factual information and cannot give rise to any section 36 prejudice. Without the benefit of seeing the disputed information, a number of her arguments were made on the premise that the information simply comprises inquiries that were made and the results of those inquiries. The Appellant has also quite logically assumed that the Kane Information would be historic dating back to when Mr Kane was appointed as the CEO of TEFT. However, the position is not that straightforward.

126. As to the claimed prejudice, the Respondents rely on section 36(2)(b)(i), 2(b)(ii) and 36(2)(c), although it would seem from the way in which the Respondent's argument has been put that they are saying that disclosure would primarily engage section 36(2)(c) i.e., prejudice to the effective conduct of public affairs. DfE says that as Chief Executive, Mr Kane was a senior figure in TEFT at the time the schools were being brokered and it was important for him to continue in that role to ensure a smooth transition.

127. We consider that the claimed prejudice in relation to the Kane Information has been overstated as regards its extent and likely effect. As regards the re-brokerage process, there is very little evidence before us as to the nature of Mr Kane's involvement specifically, in that process, and why his absence, if it came to that, would have been a significant hindrance when clearly, other senior figures at TEFT were also involved.

128. It has also been said that disclosure of the Kane Information would potentially have affected the relationship between DfE and TEFT, and that this, too, would have had an impact on the re-brokerage process because DfE needed TEFT's cooperation. However, it is entirely appropriate that checks are carried out on a senior member of a MAT running 12 schools. It is also important, in our view, to bear in mind that TEFT depended on DfE for its funding and that it actively wanted the schools to be re-brokered. In that situation it is difficult to see how disclosure of the Kane Information would undermine the relationship or compromise TEFT's cooperation.

129. We still have to consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the Kane Information.

130. Under FOIA, there is, of course, no presumption in favour of disclosure. The burden lies on DfE to establish that the harm that would be likely to be caused by disclosure is such that it outweighs the considerations in favor of disclosure. The balance of public interest should be assessed as it stood at the time of the outcome of the internal review. See Savic v ICO AGO and CO [2016] UKUT 0534 (AAC), at para 10.

131. The correct approach to the application of the public interest balancing exercise, is set out in the UT's decisions in APPGER v ICO and FCO [2013] UKUT 0560; Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC); and Home Office v IC and Bingham Centre for the Rule of Law [2015] UKUT 0308 (AAC). The public interest balance must be undertaken by reference to specific public interest factors relating to the content of the information. This does not mean that generic factors are not relevant, but they do need to be borne out by the particular information in issue.

132. The Respondents' public interest argument against disclosure are as set out above at paras 126 and 128. As already noted, we do not consider those arguments to have any real strength.

133. As to the public interest argument in favour of disclosure, Mr Kane's CV says that he started his training at John Lewis and was their youngest ever appointed senior manager. He went on to be appointed by the government to the board of BAA to help oversee the first major privatization creating BAA Ltd. He has also been the CEO of major retail chains, of Venture Capital Bank and advisor to the UK's top 100 CEOs. The Appellant says (and from the evidence before us we accept), that it is not possible to verify any of these appointments using the common internet search engines.

134. If proper checks had been carried out and Mr Kane's background was as he had stated in his CV (which is on TEFT's website), then disclosure would have no adverse implications. If proper checks had not been carried out and/or Mr Kane's background was not as he had stated in his CV, then there was clearly a public interest in knowing that, particularly given the concerns about mismanagement at TEFT and its responsibility for running 12 schools.

135. As already noted, the academies' policy has been controversial and there is clearly a strong public interest in how they operate. It is self-evident that there is a strong public interest in knowing that those in charge of MATs are fit and proper persons, and that concerns raised were properly addressed. This is particularly so in the case of TEFT with 12 schools in its charge which had experienced a number of difficulties, and where concerns had been raised as regards its governance and management. There is, in our view, a strong public interest in knowing that the CEO of TEFT, remunerated from public funds, had appropriate prior experience, and that his background had been checked and revealed no adverse information. If the checks were not properly carried out or did reveal adverse information, there would be a strong public interest in disclosure so that the relevant officials or politicians can be held accountable.

136. For these reasons, we find that in all the circumstances of the case, the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the Kane Information.

137. Accordingly, we find, that under section 36, the Kane Information is not exempt from disclosure.

The Trust Information

138. As already noted, the Trust Information comprises:

- The Performance Information (i.e. correspondence between the DfE, ESFA, and the RSC from January 2017 to the end of March 2017, relating to any discussions or proposals about measures to tackle poor performance by TEFT, its trustees, senior management and its schools); and

- The Correspondence (between RSC and TEFT from December 2016 to 11 September 2017, i.e. the date of the request).

139. As will be self-evident, the Performance Information is limited in 3 ways:

- It applies only to internal correspondence (so not to or from TEFT);
- The nature of the correspondence - it applies only to "discussions or proposals about measures to tackle poor performance by TEFT, its trustees, senior management and its schools"; and
- The time period (January 2017 to the end of March 2017).

140. The Correspondence is limited in 2 ways:

- The parties - it applies only to the correspondence between RSC and TEFT); and
- The time period (December 2016 to 11 September 2017).

The Correspondence is not limited by its subject matter, so it applies to all correspondence between RSC and TEFT in the specified period.

141. Some items of disputed information are outside the scope of the request. We raised this at the hearings in June and note that those points were addressed in DfE's e mail of 25 June 2019.

142. The public interest factors in disclosure of the Trust Information as has been put forward by the Appellant, have already been summarized, above. Her arguments are anchored particularly on the alleged failure by DfE to deal promptly and effectively with the difficulties and shortcomings at TEFT, including financial irregularity and poor management, thereby compromising the education of the children in academies run by TEFT. She argues that there is a strong public interest in knowing how academies that run into difficulties are dealt with by the DfE. We accept that this is a weighty public interest, and indeed the Respondents have not argued otherwise.

143. While the Respondents accept the public interest arguments in favour of disclosure, they say that this is not a situation where there is no relevant information available to the public. The various PTWNs and FNTLs referred to earlier in this decision are in the public domain, Therefore, there is a level of information publicly available (albeit without the detail the Appellant would like), with which to hold the DfE accountable. The Appellant's point is of course that these notices show that DfE was well aware of the problems at TEFT and its schools, but failed to act sooner.

144. To a large extent, the Respondents' arguments as to the public interest against disclosure relate to the "chilling effect" and need for a "safe space". These arguments are of course well known in FOIA cases. We do not accept the chilling effect argument in this case. There is no evidence to support that assertion. Officials are of course already aware that their communications may be disclosed under FOIA.

145. We accept, in principle, that the need for a safe space should be accorded respect in the case of live and developing issues. However, we are not persuaded, that there was still need for a safe space as at the internal review date. In respect of matters relating to the Performance Information, in particular, we do not see how discussions or proposals between January 2017 to the end of March 2017, about measures to

tackle poor performance by TEFT and its schools, could have required a safe space in February 2018 when the focus was not on tackling poor performance, but on re-brokering the schools.

146. As regards the Correspondence, while it covers a more extended time period (December 2016 to 11 September 2017), and closer to the internal review date, it applies only to the correspondence between RSC and TEFT. The need for a safe space has been put forward as relating primarily to communications between officials.

147. DfE says that present and future stakeholders (including school and college principals) must feel free to discuss matters openly and frankly with DfE without fear of later publication. However, academies are funded by the public. Information about the difficulties at a number of the schools were already in the public domain. The children at these schools have parents who have a legitimate interest in knowing how the difficulties were being addressed. We therefore do not accept that there would have been a reasonable expectation that such communications would be private.

148. The Respondents also say that disclosure as at the internal review date (February 2018), would have been likely to prejudice DfE's ability to re-broker the schools, thereby compromising or further compromising the education of the children involved, and the ability of the schools to be placed on a sounder footing. They say that it is rare for all schools in a MAT to be re-brokered and that this made the process particularly sensitive.

149. Since this has been such a core part of the DfE's position, it is unfortunate that the witness they put forward is not someone who was involved in the re-brokerage process, and who was not, therefore, able to speak from experience about the process, and the specific issues in the Trust Information that may have given rise to the claimed difficulties. That is in no way a criticism of Ms Thomas, but simply a reflection of her role.

150. The evidence is that as at the internal review date, none of the academies had been re-brokered. However, sponsors had been identified for 10 of the 12 schools. DfE argues that sponsors being identified did not mean that the position was secure. Sponsors could still back out, and in some cases, there were limited other sponsors who the DfE could have turned to. DfE says that the "market" for new sponsors is often limited and has to be dealt with sensitively. There is no tender process involved, but rather the DfE approaches potential sponsors who it thinks have the capability and experience to take on the academies that need to be re-brokered.

151. There is no evidence from any sponsor or academy as to the effect that disclosure as at the internal review date may have had on them. On the evidence before us, we do not accept that disclosure of the Trust Information at that time would have given rise to the risk that potential sponsors would withdraw, nor that prospective sponsors would have been put off. It is clear from DfE's evidence that part of the re-brokerage process involved disclosures by DfE and due diligence by the potential sponsors. To the extent that any of the Trust Information cast the academies, or any of them, in an unfavourable light, we are not satisfied that such information would not have been known through the due diligence exercise and the information already in the public domain. We note in this regard that the PTWNs and TWNs, as well as the FNTLs, referred to earlier in this decision, were in the public domain and there were several press articles about the difficulties at TEFT and its academies.

152. To the extent that the Trust Information contains material which casts TEFT in an unfavourable light, that would not, in our view, have the adverse effect as claimed. As already noted, there was already information in the public domain about the difficulties, and in any event, the potential sponsors were looking at taking over specific schools, not TEFT or its staff.

153. The Respondents also say that some of the Trust Information was quite dated by the internal review date. They argue that disclosure would have de-stabilised the academies' relations with their new sponsors by bringing up matters such as their past performance that were no longer relevant or reflective of the situation at the relevant date. We are not persuaded that this would have been the case. First, the request is limited in time to periods quite close to the date of the request. It would have been clearly known to all involved that the schools were being re-brokered because of difficulties both at TEFT and at the level of the individual academies.

154. Ms Thomas' said, in her evidence, that whilst the transfer of the TEFT academies has now concluded, there are a number of outstanding issues. She says that since the closure of TEFT is still ongoing, release of the disputed information even as at the dates of the hearing, could still have a prejudicial effect on its solvent closure.

155. It is of course the case that the implications of disclosure must be considered as at the internal review date. We do not consider that disclosure would have impacted the closure of TEFT. That would have been largely an administrative function, quite separate from TEFT's performance vis a vis the schools or its dealings with DfE.

156. As already noted, the disputed information comprises over a hundred individual items of information. We have considered each item of information. It is clearly not the case that the public interest balance is the same in every case, nor that the public interest for and against disclosure is equally strong or equally weak. We consider, however, that taken together, the disputed information tells a story. There is a public interest in disclosing information that tells that story coherently. To withhold, say, an individual e mail, would risk misleading the public and this would not be in the public interest. Therefore, in those few cases where the public interest may otherwise be more finely balanced, this consideration leads us to find in favour of disclosure.

157. For all these reasons, and in the circumstances of this case, we consider that the public interest lies in favour of disclosure of the Trust Information.

158. Having found that the disputed information is not exempt under section 36, we must go on to consider the exemptions in section 40(2) and 42, to the extent relied upon.

Section 40(2)

159. Under section 40(2) of FOIA, personal data of third parties is exempt if disclosure would breach any of the data protection principles set out in Part 1 of Schedule 1 of the DPA. The exemption is absolute.

160. *"Personal data"* is defined in section 1(1) of the Data Protection Act 1998 ("DPA"). This has since been replaced by the Data Protection Act 2018, but was in force at the time the request was made. It provides that:

> *"personal data" means data which relate to a living individual who can be identified*
>
> *(a) from those data, or*

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

161. Pursuant to section 1(1)(b) of the DPA, the disputed information comprises personal data if any individuals could be identified from it and other information which is in the possession of, or likely to come into the possession of a person, other than the data controller, after disclosure.

162. As already noted, most of the disputed information comprises e mails and other communications within DfE (including RSC and EFTA), or between RSC and TEFT.

163. The disputed information contains personal data because it refers to the names of various individuals (particularly but not only the sender and recipient of the communications), in some cases together with their e mail addresses, contact details, as well as their role in the organisation in question. There is also some personal data of external individuals.

164. Having found that some of the disputed information amounts to personal data, the next question is whether disclosure would breach any of the data protection principles.

165. Only the first data protection principle is relevant here. It provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met.

166. On the facts of this case, the only relevant condition in Schedule 2 is condition 6(1). The condition is that:

> *The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.*

167. The first issue is whether disclosure would be fair and lawful. When assessing the fairness of disclosure, the interests of the data subject as well as the data user, and where relevant, the interests of the wider public, must be taken into account in a balancing exercise. This wide approach to fairness is endorsed by the observations of Arden LJ in Johnson v Medical Defence Union [2007] EWCA Civ 262, at para 141:

> *Recital (28) [of Directive 95/46] states that "any processing of personal data must be lawful and fair to the individuals concerned". I do not consider that this excludes from consideration the interests of the data user. Indeed the very word "fairness" suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question.*

168. Although that case concerned the provisions of the Freedom of Information (Scotland) Act 2002, the principles apply equally in relation to FOIA.

169. The continued primacy of the DPA, notwithstanding FOIA, and the high degree of protection it affords data subjects, has been strongly emphasised by Lord Hope in Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550 where he states, at para 7:

> *In my opinion there is no presumption in favour of the release of personal data under the general obligation that [FOIA] lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act …. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data.*

170. The following passage in Corporate Officer of the House of Commons v IC and Norman Baker MP [2011] 1 Info LR 935 at para 28, offers further guidance on the relationship between FOIA and the DPA:

> *If A makes a request under FOIA for personal data about B, and the disclosure of that personal data would breach any of the data protection principles, then the information is exempt from disclosure under the Act: this follows from section 40(2) read in conjunction with section 40(3)(a)(i), or (when applicable) section 40(3)(b) which does not apply in these appeals. This is an absolute exemption - section 2(3)(f)(ii) FOIA. Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2(2). However… the application of the data protection principles does involve striking a balance between competing interests, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered.*

171. As already noted, fairness requires a consideration of any legitimate interests of the Appellant, and of the public in having access to the disputed information, and the balance between these interests, and the rights and freedoms of the individuals who are the data subjects.

172. We consider that it is fair to disclose the personal data of those holding senior positions because they can reasonably expect a greater degree of scrutiny and would likely have had a reasonable expectation that their personal data would be disclosed. This is the case not only with DfE (including RSC and EFTA), but also with TEFT and with any other public facing organisation such as academy schools and sponsors or potential sponsors. It also includes the personal data of Mr Kane in the Kane Information. We do not, however, consider that fairness requires disclosure of e mail addresses or direct line telephone numbers enabling members of the public to contact such individuals directly.

173. It is impractical for the Tribunal to indicate with respect to each item of disputed information which personal data can be redacted. It is also the case that DfE is the party most likely to know the seniority and roles of the various data subjects. We therefore direct that DfE should undertake the redaction exercise based on the principles referred to in para 172, and that the proposed redactions should be reviewed by the Commissioner before disclosure.

Section 42

174. DfE relies on section 42 in relation to 3 items of disputed information (items 20-22). These comprise communications in January 2017 to and from a lawyer with the Government Legal Department advising on DfE's potential recourse against TEFT.

175. Having considered these items of the disputed information, we are satisfied that the exemption is engaged.

176. Section 42 is a qualified exemption, and therefore, it is subject to the public interest test in section 2(2)(b) of FOIA. This means that the information will only be exempt if in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

177. At common law, with a very few exceptions, LPP is regarded as absolute. FOIA marks a departure from the common law's absolutist approach to LLP. However, even under FOIA, it is well established that where LPP is involved, there is a strong, inherent public interest to maintaining the section 42 exemption. The public interest factors that underpin the doctrine of LPP, i.e. that parties should be free to seek legal advice with candour and in confidence, are a weighty consideration.

178. In Bellamy v Information Commissioner & the Secretary of State for Trade and Industry (EA/2005/0023) at para 35, the FTT stated that there is:

> *a strong element of public interest inbuilt into the privilege itself" and that "at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case.*

179. The FTT's approach was endorsed by the High Court in DBERR v O'Brien v IC, [2009] EWHC 164 QB, as being founded on "decisions of courts of the highest authority upon the importance to be attached to the concept of legal professional privilege" It also stated at para 53 that section 42 cases:

> *…are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question" (para 41).*
>
> *The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight.*

180. We consider that there is a public interest in disclosing the steps that DfE took or considered taking against TEFT. However, we find that the public interest in disclosure is not such as to outweigh the inherently strong public interest in maintaining the section 42 exemption.

181. We have considered whether the passage of time has reduced the value of the LLP in the information. While it would be fair to say that given the issues on which DfE sought and received legal advice were largely (though not entirely), superseded at the internal review date by the re-brokerage of TEFT's schools, we consider that the value of the LLP has not diminished in that the advice may

apply equally to other MATs in respect of which there may be performance concerns.

182. For these reasons, we find that items 20-22 in the closed bundle are exempt from disclosure under section 42.

Decision

183. For all these reasons, we allow this appeal in part.

184. Our directions following this decision are set out in the Substituted Decision Notice.

185. Our decision is unanimous.

Anisa Dhanji
First Tier Tribunal Judge

Date of Decision: 25 November 2019
Date Promulgated: 12 December 2019

The decision was sent to the Respondents under embargo on 28 November. The comments received have been considered, and amendments have been made to ensure that the disputed information has not inadvertently been disclosed beyond what is appropriate pursuant to paras 17-19 of the decision. Where comments received dealt with the substance of the Tribunal's decision, the decision has not been amended. Amendments have also been made on some points under the slip rule, and on the Tribunal's initiative, to some drafting points, but without affecting the substance of the Tribunal's decision.