FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(Information Rights)

Appeal Ref: EA/2021/0378

Heard via CVP
On 25th & 28th February 2022

Before

Upper Tribunal Judge O'Connor
Tribunal Member Rosalind Tatam
Tribunal Member Dave Sivers

Between

Public Law Project

Appellant

and

(1) The Information Commissioner
(2) Secretary of State for Justice

Respondents

Representation:
Appellant: G. White QC & G Molyneaux of Counsel
First Respondent: B. Mitchell of Counsel
Second Respondent: C. Sheldon QC & C. Ivimy of Counsel

OPEN DECISION AND REASONS

Decision: The appeal is DISMISSED

REASONS

Preamble

1. This matter was heard remotely, without objection from the parties, using the Cloud Video Platform. There was no indication from the parties during the

course of the hearing, or thereafter, that the mode of hearing led to an inability to participate fully and effectively in the proceedings.

2. This document is the OPEN decision on the appeal, and may be disseminated and published without hindrance. A separate CLOSED decision has also been issued. The CLOSED decision is subject to an order made by this Tribunal pursuant to rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, prohibiting its dissemination to any person or body other than the respondents to this appeal and their legal teams.

Introduction

3. The Freedom of Information Act 2000 ("FOIA") provides for a general right of access to information held by public authorities. That right is subject to exceptions and exemptions. It makes provision for its enforcement by the Information Commissioner ("ICO") and for a right of appeal from a decision of the ICO to the General Regulatory Chamber of the First-tier Tribunal ("FtT").

4. The appellant ("PLP") is a charity which seeks to *"promote access to justice, uphold the rule of law, and ensure fair systems"*. On 1 April 2021, PLP made a request for information to the Ministry of Justice ("the FOIA Request"). The Ministry of Justice ("MoJ") responded on 2 June 2021 ("the FOIA Response"), providing information in relation to one part of the FOIA Request and refusing to provide information in relation to a second part thereof. PLP sought an internal review, to which the MoJ responded on 23 August 2021 ("the Internal Review"). On 25 August 2021, PLP made a complaint to the ICO.

5. The appeal to which this decision relates is brought by PLP by way of a notice of appeal, dated 8 December 2021, against a Decision Notice issued by the ICO on 15 November 2021 – referenced as IC-126073-W0C6. Therein, the ICO concurred with the MoJ's position that section 36(2)(c) of FOIA was engaged and that the public interest favoured maintaining that exemption.

The Independent Review of Administrative Law ("IRAL")

6. As will become clear from what follows, it is prudent to provide some background on IRAL.

7. The IRAL panel, chaired by Lord Faulks QC, was established on 31 July 2020 with the following terms of reference:

> "The Review should examine trends in judicial review of executive action, ("JR"), in particular in relation to the policies and decision making of the Government. It should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law. It should consider data and evidence on the development of JR and of judicial decision-making and consider what (if any) options for reforms might be justified. The review should consider in particular:
>
> 1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute.

> 2. Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability/non-justiciability of the exercise of a public law power and/or function could be considered by the Government.
>
> 3. Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.
>
> 4. Whether procedural reforms to judicial review are necessary, in general to "streamline the process", and, in particular: (a) on the burden and effect of disclosure in particular in relation to "policy decisions" in Government; (b) in relation to the duty of candour, particularly as it affects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and; (g) on costs and interveners."

8. On 7 September 2020, the IRAL panel issued a call for evidence, which ran until 26 October 2020. There were two versions of this call for evidence, one sent to Government departments ("the GD call for evidence") and the other to non-Government stakeholders. This appeal relates to the former. The covering letter to the GD call for evidence relevantly states as follows:

> "The Call for Evidence questionnaire has been drafted to ensure that all elements of the IRAL Terms of Reference are appropriately covered. The following is therefore included; whether the terms of judicial review should be written into law; whether certain executive decisions should be decided on by judges; which grounds and remedies should be available in claims brought against the government, and further procedural reforms to judicial review, such as timings and the appeal process. A separate Call for Evidence has today been issued to non-governmental stakeholders and other interested parties and individuals.
>
> We encourage you to direct your officials to respond to this questionnaire fully. Moreover, should there be additional evidence that is not asked for in the questionnaire, but that your officials believe is relevant, such as statistics or case histories, we welcome such evidence in your departmental response. However, it will be for your legal team to determine what evidence of this nature can and cannot be provided, as the IRAL secretariat is not in a position to do this."

9. The MoJ published the IRAL panel's report on 18 March 2021 ("the IRAL Report"). Annex E to the Report identifies those individuals, bodies and departments that provided a response to the call for evidence and, in particular, names 14 Government departments[1], and *"No. 10 Downing Street"* as having

[1] Attorney General's Office, Department for Business, Energy, and Industrial Strategy, Department for Digital, Culture, Media and Sport, Department for Education, Department for Environment, Food

provided such a response. PLP seek a copy of the responses made by the 14 Government departments, as well as that from "*No. 10 Downing Street*" ("the Unpublished Submissions").

10. On 18 March 2021, the Government published its response to the IRAL Report (titled "*Judicial Review Reform: The Government Response to the Independent Review of Administrative Law")* and commenced a consultation on proposals for legislation. On 7 April 2021, the Government published, *inter alia*, an unattributed summary of the responses by Government departments to the IRAL panel's GD call for evidence ("the Summary Document").

11. On 21 July 2021, the Government published its response to the consultation initiated on 18 March 2021 (titled, "*Judicial Review Reform Consultation: The Government Response")* and introduced the Judicial Review and Courts Bill ("the JRC Bill") to Parliament. The JRC Bill has recently passed the Committee Stage in the House of Lords. The Report Stage in the House of Lords is set for 28 March 2022.

The Request, Response and Internal Review

12. Returning to the origins of the instant appeal, on 1 April 2021 PLP wrote to the MoJ and requested information in the following terms:

> "On 16 March 2021 the Independent Review of Administrative Law Panel ('the Panel') published its Report. On 18 March 2021 the Government published its response ('the Response') and launched its consultation into Judicial Review Reform.
>
> Annex E to the Panel's Report contains a List of Contributors, which includes 28 local and central Government departments. The Report also confirms that additional data was provided by the Ministry of Justice, the Upper Tribunal and the GLD [Government Legal Department]. Both the Report and the Response make some references to submissions made by Government Departments such as Home Office. However, neither these submissions nor the evidence underlying them have been published.
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> On 18 March 2021 the Lord Chancellor and Secretary of State for Justice Robert Buckland stated in the House of Commons that "The Government submissions to the consultation will be summarised and published within the next 10 days or so, which will give everybody a clear view of submissions to the call for evidence, but in a way that is consistent with collective Cabinet responsibility…". The Lord Chancellor did not commit to publishing the submissions in full.
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> **Information requested under the Freedom of Information Act**

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and Rural Affairs, Department of Health and Social Care, Department for International Trade, Department for Transport, Department for Work and Pensions, Foreign, Commonwealth and Development Office, HM Treasury, Home Office, Ministry of Defence, and Ministry of Housing, Communities and Local Government.

1. Please provide all the submissions made by Government Departments to the Panel.

2. Please provide any underlying evidence, data or statistics provided by Government Departments to the Panel (whether those Departments were listed as contributors or not). In particular, please provide the data provided by the Ministry of Justice, and the data underlying the Home Office's claim, quoted at paragraph 4.13 of the Report that "it spent over £75 million in 2019/20 on defending immigration and asylum judicial reviews and associated damages claims".

13. Following publication of the Summary Document on 6 April 2021, PLP clarified its request to the MoJ as follows on 8 April 2021:

> "I write further to our FOIA request made on 1 April 2021 for the Government's submissions to the IRAL Panel, along with any underlying evidence, data or statistics provided by Government Departments to the Panel. I have enclosed a copy of that request for your convenience.
>
> I note that yesterday (7 April 2021) the Ministry of Justice published a 'Summary of Government Submissions to the Independent Review of Administrative Law' ('the Summary'). Pages 1 - 18 of the Summary outline, in general terms, the submissions made by 'fourteen Government departments. It is not clear which Departments' submissions are included in the Summary. Pages 19 – 21 summarise statistical information provided to the Panel by eleven named Departments.
>
> Annex E to the IRAL Report makes clear that fourteen central Government Departments and No. 10 Downing Street provided submissions to the Panel. It appears, but is unclear, that the No 10 Downing Street submission was not included in the Summary.
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> For the avoidance of doubt:
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> 1. The publication of the Summary on 7 April 2021 does not exempt the MoJ from complying with the FOIA request we made on 1 April 2021. That request was for the submissions and evidence provided by the Government to the Panel, not summaries thereof.
>
> 2. Our FOIA request of 1 April 2021 covers all the submissions made to the Panel by Government departments and bodies, which includes the submission made by No. 10 Downing Street. Please take into account the above information when you respond to our FOIA request of 1 April 2021."

14. On 21 June 2021, the MoJ responded to the PLP's FOIA Request, confirming that it held the information requested (i.e. the Unpublished Submissions), but stating that the information was exempt from disclosure pursuant to section 36(2)(a)(i) of FOIA on the basis that: (i) disclosure "*would prejudice the maintenance of the*

convention of collective responsibility of Ministers of the Crown"; and (ii) *"On balance…the public interest favours withholding the information at this time"*. As a part of its consideration, and in order to rely upon section 36(2)(a)(i) of FOIA, on 26 April 2021 the MoJ obtained the opinion of a Qualified Person under that provision, the then Parliamentary Under Secretary of State in the MoJ (Alex Chalk MP).

15. In its response of 23 August 2021 to PLP's request for an internal review, which had been made promptly on 8 June, the MoJ maintained its position that the Unpublished Submissions were exempt from disclosure by virtue of section 36(2)(a)(i) of FOIA.

ICO's Decision Notice

16. On 25 August 2021, PLP made a complaint to the ICO regarding the MoJ's refusal to disclose the Unpublished Submissions. Before the ICO, the MoJ additionally relied upon section 36(2)(c) of FOIA (prejudice to the effective conduct of public affairs) and obtained the opinion of a Qualified Person under that provision on 29 October 2021, from the then Parliamentary Under Secretary of State in the MoJ (James Cartlidge MP, who had replaced Alex Chalk MP).

17. In its Decision Notice of 15 November 2021, the ICO concluded that the Unpublished Submissions were exempt from disclosure pursuant to section 36(2)(c) FOIA and that the public interest weighed in favour of maintaining the exemption. In light of this finding, the ICO did not reach a conclusion on the application of section 36(2)(a)(i) of FOIA.

Proceedings before the First-tier Tribunal

18. In its Notice of Appeal (drawn up by Kate Gallafent QC and George Molyneaux of Counsel), PLP submit that (i) the ICO was wrong to conclude that the Unpublished Submissions are exempt information – addressing the application of section 36(2)(c) of FOIA when doing so; (ii) the ICO was wrong to conclude that the public interest favoured withholding the Unpublished Submissions – again focusing on section 36(2)(c) when doing so; and, (iii) it was an error to maintain reliance on section 36(2)(a)(i) of FOIA.

19. The MoJ applied to join the proceedings on 23 December 2021 and were formally joined on 29 December. The ICO provided its written Response to the appeal on 12 January 2022, comprehensively addressing the issues raised in PLP's Notice of Appeal.

20. In its written Response to the appeal, dated 26 January 2022, the MoJ raised for the first time two additional exemptions: section 35(1)(a) and section 36(2)(b)(ii) of FOIA. On the day prior to the filing of its Response, the MoJ secured the opinion of a Qualified Person, James Cartlidge MP, in respect of section 36(2)(b)(ii) of FOIA. This opinion also confirmed the engagement of sections 36(2)(a)(i) and 36(2)(c) of FOIA. No objection was taken by either PLP or the ICO to the MoJ's reliance on the aforementioned additional exemptions.

21. There is no doubt that the Tribunal has jurisdiction to consider the applicability of an exemption raised for the first time during the course of the appellate process (see DEFRA v Information Commissioner and Birkett [2011] UKUT 17 (AAC) at [58] and, also, Malnick (at [102]), where the Upper Tribunal stated, albeit in an unrelated context, that "*…the tribunal must consider everything necessary to answer the core question of whether the authority has complied with the law, and that includes consideration of exemptions not previously relied on…*").

22. The hearing of the instant appeal took place over two days. We had before us an Open Bundle running to 688 pages, a bundle of Closed material, detailed written skeleton arguments drawn by each of the parties and a bundle of authorities (921 pages). The Tribunal also heard oral evidence, in both open and closed session, from Richard Mason, Deputy Director in charge of the Constitutional Policy Division in the MoJ, and Amy Holmes, Director of Domestic Affairs within the Economic and Domestic Affairs Secretariat of the Cabinet Office. In addition, the parties made oral closing submissions in open session, and the ICO and MoJ made such submissions in closed session. Detailed gists of the evidence and the submissions heard during the closed session were provided to PLP.

23. In reaching our conclusion on this appeal, we have taken account of all the evidence and submissions before us, irrespective of whether such evidence or submissions has been specifically alluded to during the course of this decision.

The issues for consideration by the Tribunal

24. The following issues fall for consideration by the Tribunal:

(1) (a) Is section 35(1)(a) of FOIA engaged?
(b) If so, does the public interest in favour of maintaining the section 35(1)(a) exemption outweigh the public interest in disclosure?

(2) (a) If section 35(1)(a) of FOIA is not engaged in relation to the Unpublished Submissions, are sections 36(2)(a)(i) and/or section 36(2)(b)(ii) and/or section 36(2)(c) engaged?
(b) If so, in each case does the public interest in favour of maintaining the exemption outweigh the public interest in disclosure?

The legislative background

25. Section 1(1)(b) of FOIA confers a duty on a public authority, in response to a request, to provide information held by it. By virtue of section 2(2)(b) of FOIA, the duty does not extend to information if it falls within an absolute exemption, or within a qualified exemption and "*the public interest in maintaining the exemption outweighs the public interest in disclosing the information*".

26. In the instant matter, the relevant exemptions claimed are those set out in sections 35(1)(a), 36(2)(a)(i), 36(2)(b)(ii) and 32(2)(c) of FOIA. They are all qualified exemptions.

27. Section 35 reads:

"(1) Information held by a government department or by the Welsh Government is exempt information if it relates to—

(a) the formulation or development of government policy,

(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. … "

28. Section 36 relevantly states:

"(1) This section applies to—

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

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

(a) would, or would be likely to, prejudice—

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, …

…

(b) would, or would be likely to, inhibit—

…

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. "

29. By section 50 of FOIA:

"(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I."

30. Section 57 of FOIA materially states:

"**Appeal against notices served under Part IV**

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice."

The Tribunal's role

31. The role of the Tribunal is set out in section 58 of FOIA:

"If on an appeal under section 57 the Tribunal considers -

> (a) that the notice against which the appeal is brought is not in accordance with the law, or
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
>
> the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.
>
> On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

32. The import of section 58 of FOIA is that the right of appeal to the Tribunal involves a full merits consideration of whether, on the facts and the law, the MoJ's response to the FOIA Request is in accordance with Part I of FOIA (Information Commissioner v Malnick and ACOBA [2018] UKUT 72 (AAC); [2018] AACR 29 at paragraphs [45]-[46] and [90]).

Discussion

Issue 1(a): Is section 35(1)(a) engaged?

33. Section 35(1)(a) is engaged in respect of information which *"relates to…the formulation or development of government policy"*. The purpose of the section 35(1)(a) exemption is to protect *"the efficient, effective and high-quality formulation and development of government policy"* (Department of Health and Social Care v Information Commissioner [2020] UKUT 299 at [24]).

34. Policy and its development are not defined in FOIA. The ICO's guidance on the application of section 35 ("Section 35 Guidance") states, *inter alia*, that:

> "[26] …In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives.
>
> [27] There is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms."

35. PLP submit that the Unpublished Submissions preceded the process of formulation of Government policy, rather than forming a part of that process. Reliance is placed both on the evidence of Richard Mason and the terms of the MoJ's submissions to the Qualified Person (which are dated 20 January 2021 in error but must have been drawn on the 20 January 2022) which state that the Unpublished Submissions *"formed part of the early stages of formulation of government policy (that is, after the IRAL report had been received and in the period prior to consultation when we were considering policy options)"*. PLP further observe that the MoJ did not seek to rely upon the section 35 exemption prior to its

Response in the instant appeal. This, it is said, is indicative of the provision not being applicable. It is additionally asserted that communication of the Unpublished Submissions to the IRAL panel did not form part of any dialogue within government, given that the submissions were sent to an independent non-governmental body and not to the Lord Chancellor or any other government department and, consequently, they did not relate to the development or formulation of government policy.

36. In our conclusion, section 35(1)(a) is engaged, for the reasons set out below and those set out in our CLOSED decision.

37. We find that the timing of the communication of the Unpublished Submissions to the IRAL panel is not determinative of whether section 35(1)(a) of FOIA is engaged. This is so even if PLP are correct in its assertion that the formulation of Government policy had not begun as of the date of the creation, or communication to the IRAL panel, of such submissions.

38. In Cabinet Office v Information Commissioner & Morland [2018] UKUT 67, the Upper Tribunal gave consideration, *inter alia*, to an appeal against a decision of the First-tier Tribunal that section 35(1)(a) of FOIA was not engaged. The First-tier Tribunal had asked itself whether the relevant policy was still being formulated at the time of the appellant's request for information and concluded on the evidence before it that it was not. In setting aside the First-tier Tribunal's decision, the Upper Tribunal concluded, at [28] – [29], that:

> "[28] …the F-tT fell into error by treating the state of the policy process as in effect determining whether or not the section 35(1)(a) exemption was engaged. Instead, given the breadth of the wording of the statutory provision, the FtT should simply have asked itself… whether the requested information related to the process of policy formulation or development. That question is unaffected by the date of the FOIA request. …
>
> [29] …, the focus of section 35(1)(a) itself, on any plain reading, is *on the content of the requested information* and not on *the timing of the FOIA request* in relation to any particular decision-making process. There is no requirement on the face of the legislation that the policy-making process must still be live in order for the qualified exemption to bite." (emphasis in original)

39. The Upper Tribunal in Morland further observed, at [31], that "*…case law has established that 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.*"

40. Whilst we accept that the decision in Morland is not on all fours with the scenario that presents itself in the instant case, we find that the rationale deployed therein is clearly applicable.

41. In our conclusion, it is plain that there is no requirement on the face of the legislation that the policy-making process must have begun at the time of the creation, or communication, of the requested information. There is no such temporal restriction identifiable from the plain reading of the section. Nor does the legislation prescribe that the requested information must have been created for the purposes of use in the process of policy formulation or development, and we find that it was not. As the Tribunal in Morland made clear, the focus of section 35(1)(a) is on the content of the requested information. That this is so, is also consistent with paragraph 29 of the First-tier Tribunal's decision in Department of Health v Information Commissioner (EA/2013/0087), which was cited without dissent by the Court of Appeal in Department of Health v Information Commissioner [2017] EWCA Civ 374, [[2017] 1 WLR 3330, at [13]: *"the phrase 'relates to' was directed to the contents of the information – what the information was about; a less direct relationship would not qualify…A merely incidental connection between the information and a matter specified in a sub-paragraph of s35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph…"*.

42. Whether section 35(1)(a) is engaged is a question of fact to be determined by the Tribunal on the evidence before it, with the Tribunal's gaze focused on the content of the Unpublished Submissions and whether that content relates to the formulation or development of government policy, not on the timing, or purpose, of its creation or communication.

43. We find that the Government's consideration of the options for the reform of judicial review falls squarely within the meaning of *"formulation and development of government policy"* found in section 35(1)(a) of FOIA. Even if the formulation and development of government policy on the reform of judicial review was not in train at the time the Unpublished Submissions were created - and given what we say above we need make no finding in this regard - it was well underway by the date of PLP's FOIA Request on 1 April 2021 and was also in train at the date of the MoJ's final response in relation to such request (23 August 2021).

44. We observe in that regard that in his Introduction to the March 2021 consultation, which ran until the end of April 2021, the Lord Chancellor stated that any reform in relation to judicial review formed part of an on-going "*iterative process*", further observing that *"the Government is considering further reforms which build on the analysis in the Report, and on some of the options the Panel suggested but on which they did not make definite recommendations… We are consulting on these proposals at an early point in their development and are very aware that certain proposals will need further iteration, before we can consider bringing forward legislation."* In his July 2021 Response, the Lord Chancellor stated, *inter alia*, that *"the Government will continue to think about the way Judicial Review is operating in the round and whether further changes, including procedural measures on which we consulted, may be needed."*

45. As to the question of whether the Unpublished Submissions "*relate to*" the formulation and development of government policy on the reform of judicial review, in our conclusion an affirmative answer to this question is beyond

dispute. The content of the Unpublished Submissions is far from being incidental to the formulation and development of the Government's policy. The Unpublished Submissions cover a range of broad themes, all relating to the reform of judicial review. The majority of themes are set out in the published Summary Document and include: consideration of the arguments for and against codification of the core principles of judicial review; views on the evolution of the court's role in assessing justiciability; exploration of the current grounds of review; consideration of the available remedies; thoughts in relation to procedural reform; and views and evidence relating to the impact of judicial review (and the costs of judicial review) on government decision making.

46. In addition, we take note of the fact that in his OPEN witness statement Richard Mason asserted, and we accept, that the Unpublished Submissions, together with the IRAL Report and other materials, were considered by the MoJ during the process of the formulation of its policy on the reform of judicial review. In his OPEN oral evidence, Richard Mason further indicated that the Unpublished Submissions were used by the MoJ throughout the course of the year, and that development of the policy on judicial review reform is iterative. Further evidence in this regard was provided during the CLOSED session and is set out in our CLOSED decision.

47. In her OPEN witness statement Ms Holmes asserts that the information provided in the Unpublished Submissions would "*continue to inform policy thinking*" on the reform of judicial review. We accept this evidence.

48. Finally, on the issue of the engagement of section 35(1)(a), and contrary to that submitted by PLP, the fact that the MoJ did not place reliance on section 35 of FOIA until very late in the day in the instant proceedings and did not raise a section 35 exemption in response to PLP's FOIA Request or in its interactions with the ICO, does not lead us to conclude that section 35(1)(a) is not engaged. In reaching this view, we accept the OPEN evidence provided by Richard Mason as to how it came to be that section 35 was not relied upon by the MoJ at an earlier juncture. In any event, even if we were to reject such evidence and make a finding, as suggested by PLP, that the MoJ previously deliberately took the position that section 35 did not apply, our conclusion would be no different. It is entirely a matter for the Tribunal to consider, on the evidence before it, whether section 35 is engaged and, for the reasons we give above and in our CLOSED decision, we are in no doubt that it is.

<u>Issue 1(b):</u> Does the public interest in favour of maintaining the section 35(1)(a) exemption outweigh the public interest in disclosure?

49. Section 2(2)(b) of FOIA requires decision-makers, including the Tribunal, to carry out a balancing exercise, weighing the factors in favour of maintaining the exemption against the public interest factors that favour disclosure. There is

neither a presumption in favour of disclosure nor a presumption in favour of non-disclosure. Adjudging the balance of public interest is a mixed question of law and fact, not the exercise of discretion: Information Commissioner v Malnick [2018] UKUT 72 at [45(5)]. Where the decision-maker concludes that the competing interests are equally balanced, he or she will not have concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information – so that disclosure will be required (Department of Health v Information Commissioner [2017] EWCA Civ 374, [2017] 1 WLR 3330, at [46]).

50. In All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner [2013] UKUT 0560 (AAC), the Upper Tribunal said at [149]:

> "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, 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."

51. The public interest is to be assessed in light of circumstances as they stood at the date that the MoJ finally rejected PLP's request for information, i.e., 23 August 2021: Maurizi v Information Commissioner [2019] UKUT 262.

52. We now turn to consider the public interest in favour of disclosure. The thrust of PLP's case is that disclosure would inform both the public debate on judicial review reform and scrutiny of the JRC Bill.

53. It is not in dispute that there is a general, and in our view important, public interest in openness and transparency, which contributes to better governance, accountability, and democracy. The subject matter of the Unpublished Submissions i.e., the reform of judicial review, undoubtedly leads to a heightening of the public interest in disclosure. The Court's supervisory jurisdiction over decisions of the executive by way of judicial review is essential to the rule of law and has played an important role in the democratic wellbeing of the country for centuries. We agree with PLP that proposals for the reform of judicial review are matters of high constitutional significance.

54. In its written submissions, the MoJ asserts that the public interest in disclosure of the Unpublished Submissions is significantly diminished by the publication of the Summary Document, which was available in the public domain by the 23 August 2021. It is averred in writing by the MoJ that whilst the "*additional information* [to be gleaned from the Unpublished Submissions] *would enable the public to know which evidence and views can be ascribed to which individual Departments and Ministers and where there is a divergence of view*", this is of "*significantly more limited value, given the information already in the public domain*".

In its OPEN oral submissions, the MoJ took a more robust view, asserting that there is nothing in the Unpublished Submissions which would help inform public debate - the purpose of the Summary Document being to bring into the public domain matters that would be relevant to the public debate on the reform of judicial review. In support of its submissions, the MoJ drew attention to examples in the Summary Document which were said to provide information on what was described as "*the real impact*" on government departments of applications for judicial review, including the potential for a chilling effect; for example, at [18], [19] and [27] of the Summary Document.

55. We do not accept the MoJ's oral position that nothing in the Unpublished Submissions would help inform the public debate on the reform of judicial review. We concur with the MoJ's written case, that disclosure of the Unpublished Submissions would enable the public to know which evidence and views can be ascribed to which individual Departments and Ministers and, also, permit identification of those issues where there is a divergence of view. In relation to the latter, we observe that at [29] of its skeleton argument the ICO states that, "*It is apparent from the open materials that there may be more than merely attribution of views that would be made available if this information were disclosed. For example, Mr Mason at 30 of his witness statement explains that "The summary took from the Government submissions and accurately summarised material of a descriptive or factual nature, or views which were commonly held" …. He does not indicate that it summarised the content of the divergent views without attributing them. The Summary contains limited indications of the content of the divergent views held by different departments or ministers.*" We concur. We further observe that there are themes considered within the Unpublished Submissions that are omitted from consideration in the Summary Document, and we also find that disclosure of the Unpublished Submissions would add colour and context to the information contained within the Summary Document.

56. In our conclusion, it is clear that public debate on the reform of judicial review would be better informed by an enhanced understanding of the information that disclosure of the Unpublished Submissions would bring, although we also accept that the public interest in disclosure of the Unpublished Submissions is diminished by the publication of the Summary Document.

57. Given the fundamental importance of the wider reform of judicial review, we anticipate that there will be many organisations and people, including Members of Parliament and the House of Lords, with an interest and/or expertise in its reform, who might wish to contribute to the debate. A better-informed public debate must always be preferred as a matter of common sense because it supports the objective of transparency.

58. We reject the MoJ's contention that disclosure of the Unpublished Submissions would add nothing to the Parliamentary debate on the JRC Bill. We find that such disclosure would facilitate heightened scrutiny of the JRC Bill during its passage through Parliament and enable Parliamentarians to consider additional proposals for reform made by Ministers in the Unpublished Submissions. We

reach this conclusion having considered the Summary Document and the Unpublished Submissions side by side. We further observe that in his OPEN evidence, Richard Mason accepts that disclosure of the Unpublished Submissions would have prompted Parliamentary Questions and correspondence from MPs, which in our view would promote constructive debate. At the relevant time, the JRC Bill had recently been introduced to Parliament and, as can be seen by the stage it has thus far reached, there was ample opportunity thereafter for Parliamentarians to further scrutinise and debate the Bill. Insofar as Richard Mason sought to suggest that the public interest in disclosure is diminished because of the likely increase in Parliamentary Questions and correspondence from MPs, and that it would be a distraction to civil servants trying to work on the Bill, we find this position to be untenable.

59. Moving on, PLP assert that there is a public interest in understanding the true relationship between Government and IRAL and that disclosure of the Unpublished Submissions would promote such interest. Whilst we agree that the twin public interests in openness and transparency also bite on the relationship between the Government and IRAL, we conclude, contrary to the assertions of PLP and in the knowledge that PLP have not seen the Unpublished Submissions, that disclosure of those Submissions would not assist the public's understanding of such relationship. We accept Richard Mason's OPEN evidence on this issue and, in any event, have formed our own conclusions having considered the Unpublished Submissions.

60. PLP further submit that disclosure of the Unpublished Submissions would inform the deliberations of the Civil Procedure Rule Committee in its deliberations on potential changes to judicial review procedure. There is, of course, a public interest in the Civil Procedure Rule Committee being as informed as possible when considering changes to the Civil Procedure Rules, but in the context of the circumstances prevailing on 23 August 2021 it is speculative to conclude that the Unpublished Submissions would assist in that task in any meaningful way.

61. PLP also contend that disclosure of the Unpublished Submissions is necessary in order to facilitate an interrogation of the information provided by Government departments to IRAL, so as to ensure its accuracy. Reliance is placed on what are said to be statistical inaccuracies presented in the IRAL report which arose as a consequence of overly simplistic data supplied by the MoJ and misleading data provided by the Home Office. We accept the evidence of Richard Mason on this issue in relation to the two matters identified by PLP. We also accept that "*comprehensive data and statistics have been published*", such publication for the most part, if not in whole, having taken place prior to 23 August 2021. Insofar as there is a public interest in the disclosure of the Unpublished Submissions for the purposes of interrogating the accuracy of the factual matters set out therein, on the evidence before us we find the weight to be attached to that interest to be minimal.

62. We now turn to consider the public interest in maintaining the exemption. In support of its position that the section 35(1)(a) exemption should be maintained, the MoJ rely on four core strands of public interest, which in some respects overlap. It is submitted that disclosure of the Unpublished Submissions would:

    (i) undermine the convention of Cabinet collective responsibility.
    (ii) undermine the safe space needed for policy formulation and development.
    (iii) have a chilling effect on future policy formulation and development, and prejudice future independent reviews, and
    (iv) undermine the process of taking the Judicial Review and Courts Bill through Parliament.

63. The ICO's Guidance on section 35 of FOIA explains the convention of collective responsibility in the following terms:

> "[211] Collective responsibility is the longstanding convention that all ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions. It is a central feature of our constitutional system of government. Ministers may express their own views freely and frankly in Cabinet and committees and in private, but once a decision is made, they are all bound to uphold and promote that agreed position to Parliament and the public. This principle is set out at paragraph 2.1 of the Ministerial Code (May 2010):
>
> > "The principle of collective responsibility, save where it is explicitly set aside, requires that ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and ministerial committees, including in correspondence, should be maintained."
>
> [212] The convention of collective responsibility incorporates elements of safe space and chilling effect already considered above. However, there is an additional unique element that will carry additional weight: that ministers need to present a united front in defending and promoting agreed positions. If disclosure would undermine this united front by revealing details of diverging views, this would undermine ongoing government unity and effectiveness."

64. Amy Holmes further expands on the basis for and workings of the convention at [9] – [17] of her witness statement. Her evidence is consistent with the ICO's understanding of the convention, and we accept the evidence given in this regard.

65. The ICO's Section 35 Guidance continues thus, at [213]:

> "If collective responsibility arguments are relevant, they will always carry significant weight in the public interest because of the fundamental

importance of the general constitutional principle."

66. Once again, we accept the ICO's analysis, which is consistent in its attribution of the importance of Cabinet collective responsibility with Lord Bingham's observations in Bobb v Manning [2006] UKPC 22 that, "*The conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy.*" The convention, and the public interest in maintaining it, is also recognised in section 36(2)(a)(i) of FOIA. In Cabinet Office v Information Commissioner [2014] UKUT 0461, the Upper Tribunal (at [65]) observed that "*section 36(2)(a)(i) is potentially significant in indicating the importance attached by FOIA to the convention of Cabinet (or ministerial) collective responsibility*". We take cognisance, however, of the fact that, like section 35(1)(a), section 36(2)(a)(i) is a qualified exemption.

67. We observe that in Cabinet Office v Information Commissioner and Parr (EA/2019/0082), the First-tier Tribunal (Judge Hughes and Tribunal Members Tatam and Sivers) said as follows of the benefits of Cabinet collective responsibility, observations with which we concur:

> "[35] Ministers however are very aware of press comment and also of the aphorism (attributed to both Hartley Shawcross and (incorrectly) Winston Churchill):- "The opposition are in front of you, but the enemy is all around you." Ministers are competitive individuals who are concerned to succeed as Ministers, remaining popular with the disparate elements in their party and the public at large. Cabinet Collective Responsibility promotes a degree of cohesion and consistency which enable the government to function rather than falling apart under external pressures and the individual ambitions of Ministers. Lord Butler and Sir Oliver gave a very clear account of the importance of this convention in enabling thorough and considered policy formation. By holding all Ministers to a settled cabinet position, it encourages Ministers to strive to produce a robust joint decision, rather than seeking to exculpate themselves from any odium which may attach to it. While the ICO is right to say that the public is entitled to expect that "*ministers will fulfil their responsibilities in the proper manner*" it is inevitable that individuals will respond to some extent to the circumstances in which they find themselves. The tribunal was satisfied that both Lord Butler and Sir Oliver had a robust and clear-eyed understanding of how Ministers were likely to behave in responding to what they would see as a significant erosion of the accepted practice of cabinet confidentiality, they were likely to be somewhat inhibited in some contributions and seek to move discussions and decisions away from formal Committee meetings. While unattributable briefings and leaks provide some information/misinformation about Cabinet discussions their uncertain reliability and deniability within the framework of Cabinet Collective Responsibility mean that they do not usually have the impact on behaviour of Ministers that a significant possibility of the release of Cabinet papers would have.

68. We accept the ICO's submission that given the diverse ways in which

Government may make policy, there is no basis for confining the principle of Cabinet collective responsibility only to activities in Cabinet or in committees. The principle is, we find, applicable in any context where Ministers may express individual views on policy matters within the context of Government that do, or will, have a collective Government position. This submission resonates with the evidence given by Amy Holmes (at [16]) of the OPEN witness statement. We further accept, for the reasons given by Amy Holmes (in particular at [18], [21] [22] and [28] of the OPEN witness statement), that the Unpublished Submissions engage the principle of collective Cabinet responsibility. Other than the submissions proffered by HM Treasury, each of the departmental Unpublished Submissions received express Ministerial clearance before being submitted to the IRAL panel and are indicative of the individual views of a Minister. Although the existence of separate departmental submissions is publicly known, the position of individual Ministers is not currently in the public domain.

69. At [33] of her witness statement, Amy Holmes advances the MoJ's evidence as to why disclosing the Ministerial views expressed in the Unpublished Submissions would prejudice Cabinet collective responsibility, stating as follows:

> "a. The Bill has been collectively agreed and represents the policy position of the Government as a whole on certain judicial review reform measures. Disclosure of wide-ranging, frank and diverging individual Ministerial views on the topic of judicial review reform more generally would clearly undermine the ability of Ministers to maintain the "united front" necessary to promote the Bill in Parliament and robustly explain and defend the Government's position in relation to the measures contained in it. Disclosure would therefore negatively affect the Government's ability to carry out its functions in this respect, which corresponds to the significant public interest in keeping these opinions confidential.
>
> b. Government has expressly kept open the possibility of further changes relating to other topics covered by IRAL as part of the iterative process of reform. Many of the relevant Ministers who responded to the Call for Evidence remain in Government and all are MPs. As I set out below, Ministers expressed their personal opinions in their evidence to IRAL in a frank and candid manner, alongside providing factual information in response to the IRAL panel's specific questions. There are also instances where there are clearly identifiable divergences in these views. To release this information would make it more difficult for the Government to take forward this policy work, and to secure collective agreement in relation to it. Collective responsibility becomes difficult for a Minister if it becomes widely known that while he or she is still in office he or she disagrees with a Government view — given that he or she will nevertheless be compelled to defend that view on the basis of collective responsibility. Collective responsibility (and hence Cabinet Government) works only if prior discussions are kept private. Otherwise Ministers are put in the invidious position of having comments that they made about

> the policy in question when discussing it in private put to them when they are seeking to explain, defend or promote the collectively agreed Government position."

70. We accept the entirety of the evidence set out immediately above. In coming to this conclusion, we have also taken cognisance of the terms of submissions made to the designated Qualified Person by the MoJ on 23 April 2021, 13 August 2021 and 20 January 2022 [we note that this document is dated 20 January 2021, in error] and the subsequent conclusions of the Qualified Person, bearing in mind when doing so the decision of the Upper Tribunal in Information Commissioner v Malnick and ACOBA [2018] UKUT 72, at [64]-[66]. We have also put Ms Holmes' evidence in the context of the cautionary words of the Upper Tribunal in Department of Work and Pensions v Information Commissioner [2015] UKUT 0535 regarding the need to recognise "*the trouble that can be caused by the media taking a selective approach to what it publishes and putting its own spin on that material*" (at [21]).

71. We find that disclosure of the Unpublished Submissions as a whole would reveal opinions expressed by individual Ministers, which are wide ranging, frank and in some instances divergent, both in the views held on particular issues and the strength of those views. We accept that disclosure of the Unpublished Submissions as a whole would undermine the principle of Cabinet collective responsibility and would likely have the consequences identified by Amy Holmes. Our assessment of the harm flowing from such disclosure is high. In our view, the public interest in non-disclosure of the Unpublished Submissions as a whole is very strong given the consequences that are likely to flow from disclosure of the attribution of divergent views to the collective position, although we do not consider the public interest to be insurmountable. However, in the circumstances of this case, and having set out above our views as to the important public interests in favour of disclosure of the Unpublished Submissions, we find that the strong public interest arguments put forward by PLP are outweighed by the public interest in maintaining the convention of Cabinet collective responsibility that would be undermined by disclosure of the Unpublished Submissions as a whole.

72. We reach the same conclusion if we proceed on the assumption that the Unpublished Submissions could be disclosed in such a way so as to ensure that the opinions expressed therein were unattributed, which would not be an easy task given the content of the submissions. In these circumstances, disclosure would, in our view, still clearly undermine the ability of Ministers to maintain a united front. This undermines the convention of Cabinet collective responsibility and has identifiable adverse consequences for good governance. In particular, we find that disclosure of the Unpublished Submissions in this form would inevitably make it more difficult for the Government to secure collective agreement in relation to future reforms of judicial review. In such circumstances, we find that there would still be a strong public interest in favour of maintaining

the exemption and that public interest outweighs the public interest in disclosure.

73. PLP submit that even if the principle of Cabinet collective responsibility justifies non-disclosure of some of the content of the Unpublished Submissions it cannot, *"even on the MoJ's case"* justify withholding the entirety of the Unpublished Submissions. In short, PLP invite the Tribunal to undertake an analysis of the Unpublished Submissions and determine whether the principle of Cabinet collective responsibility justifies non-disclosure of each part of it.

74. In support of the contention that there must be aspects of the Unpublished Submissions in relation to which non-disclosure cannot be justified, attention is drawn to the terms of the ICO's Decision Notice, which is framed, in part, with reference to section 36(2)(a)(i) of FOIA (the exemption that exclusively relates to collective Cabinet responsibility). The Decision Notice relevantly states as follows, at [20]:

> "During the latter stage of the Commissioner's investigation the MoJ revised its position. It is now said that it wished to rely on section 36(2)(c) …for the withheld submissions in their entirety. It maintained that section 36(2)(a)(i) additionally applied to small sections of the submissions." (our emphasis)

75. The CLOSED bundle prepared for these proceedings contains a copy of the Unpublished Submissions, which have been highlighted in pink to reflect the *"small sections"* that the MoJ identified to the ICO in Annex B of its letter of 2 November 2021 as being those sections of the Unpublished Submissions that it sought, at that time, to submit were exempt from disclosure pursuant to section 36(2)(a)(i) of FOIA. The adjective *"small"* appears to have been attributed to the highlighted sections by the ICO. It is grossly misleading. The pink highlighting is variable in amount across the individual submissions, but overall it is substantial. During the CLOSED session, and we can identify no obvious reason why this now cannot now be disclosed in this OPEN judgment, we were informed that the pink highlighting in the Unpublished Submissions reflected the narrow approach to section 36(2)(a) of FOIA taken by the MoJ at that time, in that it identifies only those passages where there is *"a direct expression of opinion from a Minister or department"*.

76. In considering PLP's submission, we accept that the strength of the public interest in Cabinet collective responsibility varies depending on the nature of the information at issue. In our view, the public interest in non-disclosure is very strong in relation to those parts of the Unpublished Submissions that would allow attribution of divergent views as this would undermine the ability of Government to present a united front by demonstrating that there were disputes on particular issues now presented based on a collective position or which, going forward, could be presented on a collective basis. We find that the strong public interest arguments put forward by PLP are outweighed by the very strong public

interest in maintaining the convention of Cabinet collective responsibility in relation to such parts.

77. In our considerations, we have taken heed of PLP's observation that *"there are reasons to infer that many of the opinions expressed by Ministers in the Unpublished Submissions relate to matters other than the merits or demerits of particular policy positions"*. We address this further in our CLOSED judgement.

78. We also accept that those parts of the Unpublished Submissions that would allow the content of the divergent views to be understood, even without the ability to attribute those views to individual Ministers or departments, fall within the constitutional principle of Cabinet collective responsibility. We find that to disclose such information would undermine the ability of Government to present a united front by demonstrating that there were disputes on particular issues now presented based on a collective position or which, going forward, could be presented on a collective basis. The strength of the public interest in non-disclosure of such content is in our view still strong, but it is diminished in comparison to those parts of the Unpublished Submissions that would allow attribution of divergent views to the collective position. Nevertheless, in relation to such passages in the Unpublished Submissions, we find that the strong public interest arguments put forward by PLP are outweighed by the strength of the public interest in maintaining the convention of Cabinet collective responsibility. We address this further in our CLOSED decision.

79. Insofar as there is content within the Unpublished Submissions which accords entirely with the Cabinet collective position but on which there are also divergent views set out elsewhere in the Unpublished Submissions, we find that disclosing an attribution of this content would also undermine the principle of Cabinet collective responsibility because disclosure of attributed views consistent with the collective position would lead to the identification of those Ministers who either did not set out a view on the relevant issue or set out a view which did not accord with the collective position. This would undoubtedly undermine the ability of the Government to present a united front. Once again, we conclude that there is a strong public interest in the non-disclosure of such content. In addition, given that the assumption in this paragraph is that the passages under consideration are entirely consistent to the collective position, the public interest in favour of disclosure would necessarily, in our view, be diminished given that the collective position is already in the public domain. In all the circumstances, we find that the public interest in the disclosure of such passages is outweighed by the public interest in the maintenance of Cabinet collective responsibility. We address this further in our CLOSED judgement.

80. Even if there were unanimity on a particular issue across the entirety of the Unpublished Submissions, in our view this would not inexorably lead to the conclusion that the principle of Cabinet collective responsibility would not be undermined by disclosure of such content. The content may, for example,

express the strength of the view held on that issue which, in itself, might be divergent across the Submissions even though the ultimate view is consistent both across the Submissions and with the collective position. We find that this too would undermine the ability of the Government to present a united front, albeit the public interest in not disclosing such content is weaker than that in relation to the circumstances identified in the preceding paragraphs. Significantly, however, the public interest in the disclosure of such content would also be weaker, given that the views expressed in such content, albeit not the tone and the strength of such views, would necessarily already be in the public domain. In all the circumstances, we find that the public interest in the disclosure of such passages is once again outweighed by the public interest in the maintenance of Cabinet collective responsibility.

81. We do, however, concur with the ICO that the principle of Cabinet collective responsibility would not be undermined by the attributed disclosure of views which are entirely consistent across each of the Unpublished Submissions, including as to the strength of such views, with the collective position. We have considered whether there is any such content and find that there is not.

82. Turning to the other public interests that the MoJ submit weigh in favour of maintaining the section 35(1)(a) exemption i.e., that disclosure of the Unpublished Submissions would undermine the safe space needed for policy formulation and development, have a chilling effect on future policy formulation and development and, prejudice future independent reviews; in our conclusion, none of these factors add material weight to the public interest in favour of non-disclosure.

83. Taking the MoJ's submissions in turn, the MoJ contends that disclosure of the Unpublished Submissions would undermine the principle that Ministers should have a 'safe space' in which to debate policy issues in advance of collective agreement, without any concern that their opinions may later be revealed ("the 'safe space' principle")

84. In the DHSC case, the Upper Tribunal explain the relevance of 'safe space'/'chilling effect' arguments in the context of section 35(1)(a) of FOIA, as follows:

> "28. The case law refers to the "chilling effect" on candour among officials that would be caused if internal discussions on the formulation and development of policy were not exempt from publication. In any particular case, the chilling effect need not be proved by evidence (Department of Work and Pensions v Information Commissioner, JS and TC [2015] UKUT 0535 (AAC), para 13). The phrase "chilling effect" helps to express (in shorthand form) the objective of the exemption – which is to avoid inhibitions on imagination and innovation in thinking about public policy issues.
>
> 29. In different language, contained in the Commissioner's published policy

> documents, it is in the public interest that civil servants and officials involved in policymaking should have a "safe space" in which to do so. I accept that the free and uninhibited flow of ideas between civil servants plays an important part within the United Kingdom's constitutional arrangements. I did not understand this proposition to be in dispute.
>
> 30. The exemption relates only to the formulation and development of policy (which I shall in shorthand call "live policy" or "live policy-making") as distinct from delivery of policy objectives and from implementation. The timing of any request for information is therefore important. The need for a safe space may be diminished or even superseded by the finalisation and publication of a policy."

85. Amy Holmes provides the following explanation of the 'safe space' argument, and evidence as to the potential 'chilling effect' of disclosure, in her witness statement:

> "[13] …In order to ensure the highest quality decisions are made, Ministers need to be able to express their views fully; and debate can be robust and candid. This promotes decision-making, which is not only efficient, but is likely to yield the best outcome in terms of policy. That quality is reliant on the candour of Ministers' views and on the 'safe space' that is necessary for such candour.
>
> [33 (c)] … if Ministers believe that their views could be revealed publicly in the near future the character of these discussions would be likely to change (the so-called 'chilling effect'). I do not suggest that disclosure in the present case is likely to have any direct impact in this respect on discussions which take place in or as part of Cabinet or Cabinet committee proceedings. This is because the Government submissions were not made to Cabinet or Cabinet committees, or views in them expressed as part of Cabinet proceedings. But it is likely to mean that Ministers would be less candid when expressing their views as part of policy development in other contexts where collective agreement may subsequently be required. In particular, if the involvement of independent experts or an independent review process in policy making means that the "safe space" for Ministers to express their views is treated as non-existent (as I understand PLP suggest in the present case) or even as diluted, this would mean that Ministers would be less likely to involve independent experts in the policy process, and where they are involved, to engage so freely and frankly on an individual basis with them, given concerns about how collective responsibility would subsequently be maintained. The obvious benefits to be gained from that interaction would be lost. Any changes of behaviour in this respect would not be improper, but nonetheless reduce the candour and quality of debate, making for less informed and effective policy and collective decisions."

86. PLP assert that the consequence of the Unpublished Submissions not having been communicated within the confines of a Cabinet or Ministerial committee, or in inter-Ministerial correspondence, is that Ministers could not reasonably

have regarded the submissions as enjoying protection from disclosure akin to that which applies to debates on policy issues that have taken place within such confines. In short, it is submitted that disclosure would not undermine the 'safe space' principle because disclosure would not trespass on a 'safe space'.

87. Insofar as it is inherent in PLP's submission that the application of the 'safe space' principle is constrained to communications that take place within the confines of a Cabinet or Ministerial committee, or in inter-Ministerial correspondence, we reject that contention. We concur with the ICO's submission that the Government's 'safe space' may extend to its interactions with external bodies, where those bodies are involved in the development of policy. There is no uniform method of policymaking and, therefore, in our view there is no logical reason to confine the protection of a 'safe space' only to those contexts identified by PLP as the 'safe spaces'. External entities may be involved in the development of policy and there are good reasons to encourage Government to obtain external, expert advice without losing the protection of the 'safe space' in which to develop policy.

88. That being said, it seems to us that as a general matter, the further removed the communication is from the environments identified by PLP, the less likely the 'safe space' principle will be undermined to any material extent. There will, necessarily, be exceptions to this, identifiable on a case by case basis.

89. In the instant matter, the communication of the Unpublished Submissions did not take place within the confines of a Cabinet or Ministerial committee, or in inter-Ministerial correspondence. They were sent outside Government to a review panel that was independent of Government.

90. At, or around, the time of their communication, the MoJ's position on the publication/disclosure of the Unpublished Submissions, as identified by Richard Mason in his witness statement, was that *"the question of publication was … left to be determined once the nature of the submissions received, the IRAL report, and the Government's own response were known."* There is no indication in the evidence that publication of the Unpublished Submissions in full was, at that stage, discounted as being a possibility. It is difficult to reconcile this position with the contention that, at the time of the communication of the Unpublished Submissions to the IRAL panel, MoJ believed that it was generally understood that disclosure of their content would undermine the 'safe space' principle. It appears to us that it was the tone and nature of the Unpublished Submissions that drove the MoJ to conclude that the submissions had been communicated in a 'safe space', rather than the tone and nature of the submissions being the consequence of an understanding at the time that their disclosure would undermine the 'safe space' principle.

91. At the hearing much was made of the following passage in the GD call for evidence:

> **"Confidentiality**
> Information provided in response to this call for evidence, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the General Data Protection Regulations (GDPR), and the Environmental Information Regulations 2004).
>
> The Ministry will process any personal data in accordance with the GDPR."

92. We accept the MoJ's submission that the phrase *"published or disclosed"* contained therein, cannot be read disjunctively. Nevertheless, the inclusion of this passage in the GD call for evidence was clearly to convey the position to Government departments that any response would not be treated as confidential *per se* and that it may be disclosed or published in accordance with the access to information regimes (FOIA/EIR). In our view, this passage adds little to our considerations.

93. We also take cognisance of the fact that some Government departments made a request that their response be kept confidential. This in our view provides support for the contention that these departments were not confident that the Unpublished Submissions were to be communicated in a 'safe space' and sought reassurance in this regard. As far as we can identify from the evidence before us, the requests for confidentiality were not met with acceptance by IRAL, rather the reasons for requesting confidentiality were obtained, and noted.

94. Having considered the circumstances as a whole and in context, we find that the combination of the remoteness of the process of the GD call for evidence from what may be thought of as the traditional arenas of the application of the 'safe space' principle, in combination with what was ostensibly the sponsoring department's attitude at the time to the disclosure of the information, the benign terms of the confidentiality paragraph in the GD call for evidence which made clear there was a possibility of disclosure, and the apathy of the response by IRAL to the requests for confidentiality, leads us to conclude that disclosure of the Unpublished Submissions would not undermine the 'safe space' principle.

95. In any event, we conclude that if the 'safe space' principle were to be undermined by disclosure then, on the facts of the instant case and given what we have said above, the consequential weight to be added to the public interest in favour of non-disclosure would not be such, so as to be material to the outcome of this appeal.

96. We also reject the submission that disclosure of the Unpublished Submissions would have the chilling effect identified by Amy Holmes at [33(c)] of her witness statement. In particular, we do not accept that Ministers would be less likely in the future to involve independent experts, or an independent review process in policy making, or, where they are involved, that Ministers would be less likely

to engage freely and frankly on an individual basis with them. This issue is inherently linked to the question of whether the communication to the IRAL panel took place in a safe space. We have found that it did not, on the very particular facts of this case. It is entirely speculative to suggest that the same will be the position in relation to future scenarios in which there is an independent expert or independent review process feeding into Government policy making. We observe that Amy Holmes accepts that disclosure of the Unpublished Submissions is not likely to have a chilling effect on debate in Cabinet or Cabinet committee proceedings.

97. Moving on, the MoJ further submits that disclosure would hamper the Government's ability to manage reform of judicial review generally, including ensuring the passage of the JRC Bill. Save for those matters which we have already considered above in our analysis of the public interest in maintaining the principle of Cabinet collective responsibility, we concur entirely with the ICO's position on this submission i.e., that it is a generic claim and adds no material weight to the public interest analysis.

98. Bringing this all together, having carefully considered the parties' submissions, the evidence of the witnesses, and the OPEN and CLOSED documentation we find, in relation to disclosure of the Unpublished Submissions as a whole, that the public interest in maintaining the section 35(1)(a) exemption outweighs the public interest in favour of disclosure.

99. Turning to the question of whether any part of the Unpublished Submissions should be disclosed pursuant to Part 1 of FOIA, we first consider the submissions other than those provided by HM Treasury, which we discuss separately below.

100. The Unpublished Submissions each contain passages which provide factual information, such as background context to the individual department's submission; for example, an explanation of the portfolio of the department or Minister, or provision of a summary of the GD call for evidence. Insofar as this, and any other, information is already accessible in the public domain, we find that there is no public interest in its disclosure. There are also introductory paragraphs, and sentences within paragraphs, which of themselves are of no intrinsic value other than to provide context for that which follows. In our conclusion, there is no inherent public interest in the disclosure of these paragraphs or sentences. We accept Mr Sheldon's oral submission that to leave these parts unredacted (i.e., to disclose just these parts of the Unpublished Submissions) would create a risk of confusion and lead to unnecessary speculation, which is not in the public interest.

101. Finally, in relation to the Unpublished Submissions other than those provided by HM Treasury, having applied our analysis of the respective strengths of the public interest detailed above to each other part of the Unpublished Submissions, we conclude that there is no part of those submissions in which the public

interest in favour of disclosure is not outweighed by the public interest in maintaining the section 35(1)(a) exemption.

102. Lastly, we turn to the Unpublished Submissions of HM Treasury. It is to be recalled that each of the departmental Submissions, save for those of HM Treasury, received express Ministerial clearance before being submitted to the IRAL panel.

103. In the MoJ's letter to the ICO of 2 November 2021, under a heading related to Cabinet collective responsibility, the following is said:

> "Where responses were not explicitly signed by Ministers, they are still indicative of Ministerial opinions on the politically controversial topic of Judicial Review (JR), as officials would have shaped their responses according to their department's strategic interests – which are set by Ministers."

104. We need not dwell on this assertion because a more reliable, and in our view contrary, picture of whether HM Treasury's submissions were intended to be indicative of its Ministers opinion, can be found stated clearly on the face of the submissions themselves. We heard nothing in the oral evidence to indicate that the MoJ's view on this issue should be preferred to that of HM Treasury and, in those circumstances, we find that the Unpublished Submission of HM Treasury does not represent the opinion or views of its Minister.

105. It does not follow directly from what we have said above that disclosure of HM Treasury's Unpublished Submissions is required by FOIA. The submissions still undoubtedly relate to the formulation and development of government policy, for all the reasons we have previously given.

106. There are passages within HM Treasury's submissions which we accept by inference, if not directly, convey the unattributed views and opinions of other departmental Ministers in relation to the reform of judicial review. In our conclusion, disclosing these passages would undermine the principle of Cabinet collective responsibility, and assessing the strengths of the relative public interests, we find that the public interest in the disclosure of such passages is outweighed by the public interest in the maintenance of Cabinet collective responsibility.

107. Additionally, we accept Richard Mason's evidence in CLOSED session that there are passages within the document which, if disclosed, could prejudice the Government's position in future litigation. There is clearly a public interest in non-disclosure of these aspects of the Unpublished Submission and, in our conclusion, this public interest far outweighs the public interest in disclosing the content of such passages.

108. HM Treasury's submission also contains passages which relay information that is accessible in the public domain, as well as introductory paragraphs and

sentences of the sort referred to in paragraph 100 above. In relation to these passages, we reach the same conclusion at this juncture as we did when undertaking our assessment of the other 14 Unpublished Submissions.

109. Having scrutinised the Unpublished Submissions of HM Treasury, we find that the information contained therein falls in its entirety within the information types identified in paragraphs 106 to 108 above. In relation to such information, we conclude that the public interest in favour of disclosure is outweighed by public interest in maintaining the exemption.

110. For these reasons the appeal is dismissed. The Decision Notice is in accordance with the law. Although the ICO made its decision on an entirely different basis to that considered by the Tribunal we find, as did the ICO, that the Ministry of Justice's response to the FOIA Request is in accordance with Part I of FOIA.

111. In the normal way, a copy of this Decision was sent to the ICO and to the MoJ for them to check the draft and make representations as to whether any parts of the Decision should not be disclosed. The version of the Decision provided to PLP and promulgated generally will have been redacted and/or edited, if necessary, in light of such representations.

Signed: Dated: 19 March 2022

Amended on 25th March 2022

UTJ O'Connor

Upper Tribunal Judge O'Connor