Neutral citation number: [2024] UKFTT 001061 (GRC)

Case Reference: FT/EA/2024/0227 and FT/EA/2024/0248

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Decided without a hearing
Decision given on: 28 November 2024

Before

JUDGE MOAN
TRIBUNAL MEMBER GRIMLEYEVANS
TRIBUNAL MEMBER TATAM

Between

(1) LIAM O'HANLON
(2) CABINET OFFICE

Appellants

and

(1) INFORMATION COMMISSIONER
(2) CABINET OFFICE

Respondents

The appeals were determined without a hearing with the consent of all parties.

Decision:

1. The Appeal of Mr O'Hanlon is Dismissed.
2. The Appeal of the Cabinet Office is Allowed
3. The information provided to the Tribunal for the Appeal in the open bundle may not be published without the permission of the Tribunal.

Substituted Decision Notice:

The Cabinet Office is allowed to rely on section 36 of the Freedom of Information Act 2000 to withhold the disputed information (internal email inbox addresses).

REASONS

Noting that there are two Appellants and two Respondents as a result of joined appeals arising out the same decision, Mr O'Hanlon will be referred to as "the Appellant" throughout. The other parties will be referred to by name.
EA/2024/0227 is the appeal of the Appellant against the decision of the Information Commissioner. EA/2024/0248 is the appeal of the Cabinet Office against the decision of the information Commissioner.

Decision under appeal

1. These appeals were brought under **section 57 of the Freedom of Information Act 2000** ("FOIA"). The appeals are against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice dated 28th May 2024 (reference IC-255443-B4J5).

2. The Appellant requested from Cabinet Office information relating to correspondence between the Information Commissioner and the Cabinet Office following a letter from his MP. The Cabinet Office refused the request under section 36(2)(c) of the Freedom of Information Act 2000 (FOIA).

3. The Commissioner's decision was that the Cabinet Office was not entitled to rely on section 36(2)(c) of FOIA to refuse to comply with the request for information. The Commissioner required the Cabinet to disclose the information on internal email addresses.

Background to the appeals

4. Following events in 2013 and a number of FOIA requests and appeals thereafter, on 19th December 2022, Mr Charalambous MP emailed the Secretary of State for Digital, Culture, Media and Sport (DCMS) regarding the role of the Qualified Person under section 36 FOIA enclosing a letter that he had received from the Appellant. The correspondence was transferred by DCMS to the Cabinet Office.

5. On 26th January 2023, the Appellant wrote to the Cabinet Office and requested information as follows:

"*This is a request for disclosure to me of recorded information held by the Department which comprises, records or is related to "contact with the ICO" as referred to in the Minister of State's letter to Bambos Charalambous MP of 9 January 2013 under your reference MC2022/18026, in response to his e-mail to the secretary of State for Digital, Culture, Media and Sport of 19 December 2022.*

As the response must have followed contact between your Department and DCMS the request extends also to information which comprises, records or is related to that contact, or such contact between DCMS and the ICO for that purpose.

Compliance with this present FOI request may disclose whether the ICO in informing the Cabinet Office of its "updated version of the guidance" took, or claimed to have taken, any legal advice. I am aware that the ICO might enjoy legal professional privilege in respect of any advice sought or given in good faith, but also that FOIA provides for disclosure of privileged information if in the overriding public interest.

As to the public interest, the ICO is aware of an Upper Tribunal case called Malnick saying in March 2018, as a general observation: 'it is clear that Parliament has chosen to confer responsibility on the [Qualified Person]…Only those persons listed in section 36(5) may be QUALIFIED PERSONs. They are all people who hold senior roles in their public authorities…'. That case still finds no place in the ICO Guidance, which is inconsistent with the MoJ's guidance of 2008: 'It is because the scope of the provision [section 36] is so potentially wide that the requirement for a qualified person to take the decision…was included in the legislation".

6. On 23rd February 2023, the Cabinet Office responded. It explained that it held information falling within scope of the request but needed further time to consider the public interest test to determine whether section 36 would be used to withhold

the requested information. Further letters were sent to the Appellant on 24th March and 25th April 2023 to advise that the Cabinet Office were still considering his request.

7. The Cabinet Office substantively responded on 25th May 2023, confirming that it held information within scope of the request. It informed the Appellant that section 36 (prejudice to the effective conduct of public affairs) was engaged but after weighing the public interest test, it had concluded that the weight was in favour of disclosure. It disclosed the information subject to redactions where the information contained personal data and cited section 40(2) of the Act. The disclosed information had a date range from 21st December 2022 to 5th January 2023.

8. Following an internal review requested by the Appellant on 11th June 2023, some further information was disclosed to the Appellant with personal data redactions.

9. The Appellant complained to the Commissioner on 21st August 2023 and specifically that -

   a) further information must be held within the scope of the request,

   b) the period for considering the public interest test was excessive,

   c) reliance on s.40(2) FOIA was late and redactions needed verification from the Commissioner, and

   d) there must be a record of the transmission of Mr Charalambous's letter of 19th December 2022 from DCMS to the Cabinet Office. During the Commissioner's investigation the Cabinet Office also sought reliance on s.36(2)(c) FOIA to withhold team email addresses (having previously relied on the personal data exemption).

10. The Commissioner considered the Appellant's concerns and the Cabinet Office's submissions, and concluded that -

    (a) The request, objectively read, sought information generated following Mr Charalambous's letter of 19th December 2022 to DCMS. The Commissioner also noted that the Appellant had not complained either in his request for internal review or his complaint to the Commissioner that information had not been provided predating

the letter of 19th December 2022. However, he did find that the request included any internal correspondence generated following receipt of the MP's letter, and that the Cabinet Office should search for any such information and either disclose that information or provide a valid refusal notice.

(b) The period that the Cabinet Office took to consider the public interest test was not reasonable and accordingly was in breach of s.17(3) FOIA 2000.

(c) The Cabinet Office had correctly relied upon s.40(2) FOIA but was in breach of s.17(1) FOIA for its late reliance on the exemption.

(d) With regards to the Cabinet Office's reliance on s.36(2)(c) FOIA the Commissioner concluded that the exemption was not engaged as the Qualified Person's opinion pre-dated the request.

11. The Commissioner therefore ordered the Cabinet Office to -

(a) disclose the relevant team email addresses,

(b) disclose the internal email referred to in the decision notice, and

(c) take appropriate measures to determine if it held any further internal emails within the scope of the request. If any further emails were to be discovered the Cabinet Office was to either disclose the same or issue a valid refusal notice.

12. On 27th June 2024 the Cabinet Office indicated that it intended to lodge an appeal regarding the team email addresses but disclosed the relevant emails subject to the redaction of personal data, and disclosed two further emails discovered following further searches subject to the redaction of personal data and team email addresses. Therefore, the only information outstanding was the relevant team email addresses.

Appellant's grounds of appeal dated 10th June 2024

13. The grounds of appeal were not easily established on the notice of appeal but appeared to be that the Appellant submitted that:

(a) The Commissioner was wrong to limit the scope of the request to information recorded as a result of the MP's letter. The information requested was any contact

with the Commissioner held as at the date of the request including information prior to the MPs letter dated 19th December 2022.

(b) The Cabinet Office misused section 10(3) FOIA in granting itself extensions to conduct the public interest test as it had not, at that time, obtained a valid Qualified Person's opinion.

(c) The information disclosed was not capable of prejudicing the Cabinet Office's effective conduct of public affairs.

14. On 25th July 2024, the Appellant confirmed the basis of his appeal as –

(i) The decision notice's elimination from scope of:

(a) attachments to the MP's letter/email of 19th December 2022 and

(b) all records pre-dating receipt of that letter.

(ii) The Cabinet Office's use of section 36 to justify delay in responding to the FOIA request of 26th January 2023 – in the absence of a current section 36 Qualified Person's opinion from a Minister.

(iii) The absence of potential for section 36 'prejudice' to flow from disclosure of what the Cabinet Office did disclose on 25th May 2023.

There had been no application to amend the grounds of appeal.

15. The issues surrounding the timeliness of the Cabinet Office's reply are not matters within the Tribunals remit. The Commissioner accepted the Cabinet Office had not replied in a timely way. The Cabinet Office had kept the Appellant informed about the time needed to assess the public interest consideration prior to its response with monthly updates. The opinion of the Qualified Person regarding the team email addresses was obtained in June 2022 and so the extensions were not used to get an opinion in this case as suspected by the Appellant. The Appellant's suspicions about the reason for the delay were not supported by the evidence or a ground of appeal that could be considered by the Tribunal. Similarly, the Tribunal is not assessing the presence or absence of prejudice flowing from the disclosure; the Tribunal is confined to the reasonableness of the opinion that prejudice is likely. The Tribunal limited the consideration of the Appellant's appeal to the other two grounds of appeal.

The Commissioner's response to the Appellant's appeal dated 10th July 2024

16. The Commissioner opposed the appeal and maintained that the scope of the request for information was confined to information generated by Mr Charalambous MP's letter of 19th December 2022. It was clear the terms of the request sought the information comprising the "contact with the ICO" as referred to in the Minister's letter in response on 9th January 2023. The reference to contact with the Commissioner in the response letter objectively referred to contact with the Commissioner in connection with the MP's correspondence. If the Appellant intended the request to capture a much wider timeframe of the Cabinet Office's contact with the Commissioner generally regarding s.36 FOIA then the request could have included much clearer terms. As noted by the Tribunal in **Berend v Information Commissioner & London Borough of Richmond upon Thames EA/2006/0049 & 50** "there is no requirement to go behind what appears to be a clear request". Furthermore, the Cabinet Office is best placed to understand what contact was being referred to in the Minister's letter and confirmed during his investigation that it did not consider a plain reading of the request to include information held before the receipt of the MP's correspondence on 19th December 2022.

17. The Cabinet Office found the information within the scope of the request to be exempt under section 36(2)(b)(i) and (c) of FOIA but concluded that the public interest favoured disclosure; and disclosed the material subject to redaction of personal information. Later, the Cabinet Office relied on section 36(2)(c) to withhold team email addresses.

18. For the purposes of s.36(2)(c) FOIA, the Commissioner only received the submission and Qualified Person opinion relating to the team email addresses, which was dated in 2022. That opinion was provided by Lord True, the Minister in June 2022. The Commissioner considered that opinion to be invalid and ordered disclosure of the team email addresses. He noted that there was a separate opinion concerning the substantive emails, as the internal review refers to the opinion being obtained from

the Minister of State Baroness Neville-Rolfe. Accordingly, the Cabinet Office may well have been entitled to rely in principle on the extension to consider the public interest test (albeit for an unreasonable period) and the exemption.

19. However, the Appellant's concerns regarding the extension for the public interest considerations, and whether a valid Qualified Person's opinion was obtained, are ultimately academic as the information (the substantive emails) had been disclosed or, in the case of team email addresses, had been ordered to be disclosed with the Commissioner finding that the public interest extension was unreasonable.

The Cabinet Office's appeal dated 9th July 2024

20. The Cabinet Office disclosed the information it held which it considered to be within the scope of that request, save that it redacted one discrete category of information, namely certain team email addresses used solely for internal purposes (i.e. not for communication with the public). It did so in reliance on section 36(2)(c) FOIA.

21. The Commissioner ordered the Cabinet Office to take steps to remedy that issue. The Cabinet Office had complied with the other two parts of the Commissioner's decision; it had disclosed the email referred to at para. 33 of the Commissioner's decision (subject to personal data redactions as permitted under this decision notice), and it had conducted further searches and provided the requester with further disclosure and a notice of partial refusal. The second and third bullet points from the Commissioner's order as set out at para. 5 of its decision notice were not in issue in the appeal. Instead, the appeal is concerned with the Commissioner's order in the first bullet point of para. 5, namely the team email addresses.

22. The Commissioner ordered the Cabinet Office to disclose the internal team email addresses contained within the set of information falling within the scope of this FOIA request. The Commissioner concluded that section 36(2)(c) FOIA was not engaged because, in the Commissioner's view, there was no valid opinion in place.

23. In withholding the internal team email addresses contained within the in-scope information, the Cabinet Office relied on an opinion dated 22nd June 2022 given by Lord True, who was at that time the Minister of State for the Cabinet Office. By the time of this FOIA request, Lord True no longer held that position. Lord True's opinion was given in respect of a specified internal team email address and "going forward any internal-only team mailboxes". Lord True agreed with the reasons given in a submission dated 9th June 2022 for the engagement of section 36(2)(c) FOIA, which were as follows:

    a. Given that the team mailboxes are of internal use by the Cabinet Office team, disclosure may undermine the work of government departments as they may be subjected to unwarranted emails and spam. This would in turn impact the efficiency of civil servants' day to day work as teams may receive campaign related emails or hateful messages via the email address.

    b. Disclosure would distract officials and externally appointed parties that control the mailbox from answering any follow up questions, bring about undue premature scrutiny and interest from the disclosure. This distraction would potentially be to the detrimental to the government's objectives.

    c. There are already ways for the public to contact the Cabinet Office which are resourced appropriately for this kind of public facing role.

24. An opinion is "reasonable" for section 36(2) FOIA purposes if it is reasonable in substance. Procedural reasonableness is not relevant: per **IC v Malnick and ACOBA [2018] UKUT 72 (AAC)** at paragraph 56. Lord True's opinion was reasonable in substance: his conclusion was within the range of reasonable conclusions open to him. Instead, the Commissioner concluded that section 36(2)(c) FOIA was not engaged because for a Qualified Person's opinion to be valid, it must necessarily post-date the FOIA request in respect of which it is applied, and it must be given in respect of that specific request. The Commissioner concluded that, because Lord True's opinion was given before the date of this request and not specifically in relation to it, no valid opinion had been given at all. The Commissioner had effectively construed section 36 as dependent on the specifics of a request. That was

wrong. Properly construed, section 36 applied where the information that was requested was covered by an opinion of a Qualified Person given in respect of that information (regardless of the specifics of any request for that information). Nothing in the statutory language precluded a Qualified Person from giving a valid opinion in respect of a described category of information, provided that, where that opinion was relied upon in response to a particular request, the information sought by that request fell within the described category of information in respect of which the Qualified Person gave their view. Nothing in the statutory language precluded reliance on an opinion that predated the request in respect of which that opinion was relied upon.

25. The Commissioner had erred in law by failing to assess the substantive reasonableness of the opinion, and had instead focused on procedural considerations which, by application of both the statute and case law, were not relevant to the analysis (and certainly not capable of supporting the Commissioner's bright-line approach). The Commissioner should have concluded that a valid opinion of a Qualified Person was in place that extended to the withheld information, and that the opinion was reasonable in substance, such that section 36(2)(c) FOIA was engaged.

26. The Commissioner should then have gone on to conclude that the balance of the public interest favoured maintaining that exemption. There was very significant public interest in maintaining the exemption in order to prevent the prejudicial consequences upon which Lord True's opinion was based. The concerns in mid-2022 when Lord True gave his opinion were also as pertinent in early 2023 when the request was made and were not time sensitive. The concerns related to the effective conduct of government not to a situation pertinent to a specific time. In contrast, there was no public interest at all in the public disclosure of internal team addresses in the first part of 2023 (or at any other time).

The Commissioner's response to the Cabinet's Office appeal dated 22nd August 2024

27. The Commissioner referred to the case of **Information Commissioner v Malnick & ACOBA [2018] UKUT 72 (AAC)** which held that the focus of the Tribunal was the reasonableness of the Qualified Person's opinion. The timing of the opinion was not an issue in that case. The procedural irregularities presented by an opinion pre-dating a request go not to whether it was a reasonable opinion but to whether it was an opinion for the purposes of s.36(2) FOIA at all in the first instance. Accordingly, the Upper Tribunal's decision in **Malnick** was fundamentally distinguished from the issues in the present matter, such that it was not binding or persuasive authority for the Cabinet Office's proposition. Instead, the consideration of this issue turns, in the Commissioner's submission, on the statutory language and purpose of FOIA.

28. Looking at the wording of s.36(2) FOIA itself it stated that "information to which this section applies was exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act" would cause the stated prejudice.

29. Information in this context was in reference to information that fell within the scope of the particular request for information that has been submitted. The Commissioner considered it to be a clear requirement for the opinion to relate to the specific information requested by the individual as held and withheld by the public authority. Section 36 FOIA only became relevant once a request had been made and its use was therefore specific to and dependent upon the particular information requested and the circumstances surrounding it. The public interest test fell to be considered at the time of the public authority's response in accordance with the statutory time for compliance (Montague) and, as the Upper Tribunal commented in obiter in **Maurizi v Information Commissioner & CPS [2019] UKUT 262 (AAC)** "Parliament could not possibly have intended for the public interest and questions of fact relevant to whether information is exempt to be determined according to different temporal reference points". The Cabinet Office's position also, in effect, introduced an additional exercise whereby a public official had to consider a pre-existing opinion to determine whether the information, or category of information as

the case may be, considered in that opinion was sufficiently similar to the actual requested information in a given case, or whether the current circumstances are the same or any differences immaterial, such as to permit reliance on the older opinion. However, this placed the decision-making for such matters, in practice, to public officials when it was a task set for the Qualified Person to determine whether the actual requested information in a given case would or would be likely to give rise to the prejudices set out in s.36 FOIA if it were to be disclosed. Clearly such actions limit and fetter the discretion entrusted to those that have been considered qualified to provide such opinions.

Further response of the Cabinet Office dated 11th September 2024

30. The Commissioner emphasised the word "the" in section 36(2) ("disclosure of the information"). That did not assist the Commissioner's case, and indeed undermined the statutory language which indicated that the opinion must be directed to the information that was the subject of the request. The statutory language plainly did not require that the opinion be directed to the request itself, which was what the Commissioner required. The Commissioner conflated the concepts of "request" and "information".

31. The Cabinet Office had no difficulty with the proposition that circumstances as they stood at the time of the particular FOIA request were relevant to the analysis: they were capable of affecting not only the public interest balance but also the substantive reasonableness of the Qualified Person's opinion.

32. The Commissioner expressed concern that the Cabinet Office's approach amounted to a "stock 'blanket' opinion for various categories of information" that would "set a precedent that would undermine the wider operation of FOIA and specifically s.36 FOIA". Those concerns were misplaced: the Cabinet Office's approach was not based on a category of information, but on a precise set of information; it set no precedent, and certainly not one that undermined FOIA in any way, given that – as the Cabinet Office has made clear – circumstances as they stood at the time of a particular request

may mean that it was no longer substantively reasonable to rely on an opinion previously given in respect of that precise set of information. If necessary, the Qualified Person would be approached for a fresh opinion, there was no question of an official making the decision about section 36(2)(c).

33. It was notable that the Commissioner 's Response did not suggest that (i) the opinion relied on by the Cabinet Office was unreasonable or invalid in any respect other than the one identified in the Commissioner's decision notice, or that (ii) there were any, or any sufficient public interest considerations that would have justified the disclosure of the internal team email addresses if section 36(2) FOIA were found to be engaged in this case.

Procedural matters relating to the determination of the appeals

34. The Tribunal considered an open bundle (345 pages) and a closed bundle (25 pages) which contained the disputed material. The Tribunal noted that the open bundle contained information related to later FOIA requests made by the Appellant including a decision of the Commissioner of 23rd July 2024 IC-273298-P)G6; the appeal against that decision was not before this Tribunal. The closed bundle was held subject to a prohibition under **rule 14 of the Tribunal Procedure (First-tier Tribunal) (General 2 Regulatory Chamber) Rules 2009**. The Tribunal directed that the closed bundle was not to be disclosed but indicated that it would keep that decision under continuing review.

35. The Tribunal determined this appeal without a hearing in accordance with **rule 32 of the Tribunal Procedure (First-tier Tribunal) (General 2 Regulatory Chamber) Rules 2009**. All parties consented to the matter being determined without a hearing and the Tribunal was satisfied that it could properly determine the issues without a hearing.

The Legal Framework

36. The Freedom of Information Act 2000 allows any person to make a request of public authorities for information. The right is contained in section 1(1) as follows:

(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

37. Subject to the authority requesting further information from an applicant to identify and locate the information, the Act provides for disclosure of the information (not documents) unless one or more exemptions in the Act apply.

38. An authority may rely on an exemption under Part II of the Act before the Tribunal that it had not been relied upon previously, subject to the Court's case management powers.

39. Section 36 of FOIA provides an exemption where the Qualified Person reaches a reasonable opinion as to the prejudice of disclosure. The Qualified Person is a specific individual who has the highest level of accountability. The qualified person was the person authorised as such by a Minister of the Crown: s. 36(o)(iii) FOIA. For information held by a government department in the charge of a Minister of the Crown, the qualified person is any Minister of the Crown (s.36(5)(a) FOIA).

40. The reasonable opinion concerns whether the disclosure of the information would have the effects as set out in paras (a) to (c) of section 36(2). In this case, it is para (c) that is relevant.

41. Section 36(2)(c) FOIA provides that:

(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 –

…

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

42. Guidance was given by the Upper Tribunal on the section 36 exemption in the case of **Information Commissioner v Malnick and the Advisory Committee on Business Appointments: [2018] UKUT 72 (AAC).**

43. At para 28 - The starting point must be that the proper approach to deciding whether the Qualified Person's opinion is reasonable is informed by the nature of the exercise to be performed by the Qualified Person and the structure of section 36.

44. At para 29 - Parliament has chosen to confer responsibility on the Qualified Person for making the primary (albeit initial) judgment as to prejudice… It follows that, although the opinion of the Qualified Person is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect.

45. At para 32 - The Qualified Person is not called on to consider the public interest for and against disclosure. Regardless of the strength of the public interest in disclosure, the Qualified Person is concerned only with the occurrence or likely occurrence of prejudice. The threshold question under section 36(2) does not require the Commissioner or the First-Tier Tribunal to determine whether prejudice will or is likely to occur, that being a matter for the Qualified Person. The threshold question is concerned only with whether the opinion of the Qualified Person as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the Tribunal).

46. At para 47 the Upper Tribunal approved paragraph 60 of the First Tier Tribunal decision in **Guardian Newspapers Ltd and Heather Brooke v Information Commissioner and British Broadcasting Corporation (EA/2006/0011 and EA/2006/0013 -**

"60. On the wording of section 36(2) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable. We do not favour substituting for the phrase "reasonable opinion" some different explanatory phrase, such as "an opinion within the range of reasonable opinions". The present context is not like the valuation of a building or other asset, where a range of reasonable values may be given by competent valuers acting carefully. The qualified person must take a view on whether there either is or is not the requisite degree of likelihood of inhibition. We do, however, acknowledge the thought that lies behind the reference to a range of reasonable opinions, which is that on such matters there may (depending on the particular facts) be room for conflicting opinions, both of which are reasonable."

47. At para 56 …the Upper Tribunal concluded that "reasonable" in section 36(2) means substantively reasonable and not procedurally reasonable.

48. In summary, The Tribunal will be concerned with whether the opinion was reasonable and not any procedural flaws in the opinion; it is not for the Tribunal to form its own opinion on whether s36(2)(c) prejudice applies. The public interest test also applies in that the public interest in maintaining the exemption must outweigh the public interest in disclosing the information.

49. The Powers of the Tribunal are provided by **section 58(1) of the 2000 Act:**
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.

50. The powers of the Tribunal were considered by the Upper Tribunal in **Information Commissioner v Malnick and the Advisory Committee on Business Appointments [2018] UKUT 72 (AAC)** who confirmed that the Tribunal conducts a full merits review of the Commissioner's decision albeit the starting point was the

Commissioner's decision. The Tribunal will give such weight as it considers fit to the Commissioner's views and findings; and will determine whether the Commissioner's decision was in accordance with the law. The appeal process is not adversarial, it is inquisitorial by nature.

51. In **Montague v Information Commissioner and the Department of International Trade [2022] UKUT 104 (AAC)**, the Upper Tribunal decided that the public interest balance must be assessed on the basis of how matters stood at the time of the public authority's decision.

Analysis of the evidence and findings on appeal

52. There were peripheral issues raised that will not be adjudicated upon by the Tribunal – the timeliness of the response from the Cabinet Office, the reason for that delay, whether the MP was being misled about the new guidance noting that new guidance was substantially similar in content to the old guidance, the development of the Commissioner's section 36 guidance, or whether the Cabinet Office or its staff fell short of the Nolan principles. The Tribunal does not have supervisory responsibility over either the Commissioner or the Cabinet Office. The Tribunal must decide whether the exemption has correctly been applied.

53. The Appellant submitted that the scope of his request related to all correspondence between the Commissioner and the Cabinet Office in relation to the operation of section 36. The Tribunal noted that the issue of scope was not part of the original complaint to the Commissioner. The issue of the scope of the request has been raised by the Appellant in the appeal, albeit not substantively considered in the decision notice.

54. The Appellant said in his request for an internal review that a civil servant questioned the Commissioner's guidance two days after the MPs letter and expected new guidance would address the MP's concerns. He opined that the civil servant must have contacted the ICO and that these contacts were within the scope of his request.

The Cabinet Office did not interpret the request to include *any* records held before the MPs letter dated 19th December 2022. The Cabinet Office noted that the Appellant made a further request for information during the internal review that encompassed much of the additional information that the Appellant sought during the internal review. Section 1(4) of FOIA made it clear that the information to be provided is the information held at the date of the request; there was no basis for the Appellant to suggest that he should have been provided with any information up to the decision in May 2023. The relevant date is the date of the request.

55. The Cabinet Office widened the scope of the request as part of the internal review and included all communications between DCMS and the Cabinet Office for the purpose of and from the date of the MPs letter, and provided the information that was within scope. The Cabinet Office accepted that there had been discussions between it and the Commissioner earlier in the year about section 36 guidance and that there were earlier records regarding discussions about section 36 prior to the MPs letter but that they had not been disclosed as were not considered to be within scope.

56. The Tribunal considered the wording of the request and objectively considered that the Appellant was seeking contact between the Commissioner and the relevant Departments as a result of the letter dated 19th December 2022 by the use of the phrases "in response to his email … dated 19th December 2022" and contact "between the DCMS and the Commissioner **for that purpose**". The wording did not include earlier correspondence, nor earlier records relating to the Commissioner's guidance on the Qualified Person in section 36 FOIA. The Tribunal concluded that the scope of the request was communications as a result of the 19th December letter between the DCMS, Cabinet Office and the Commissioner. As such, the Appellant's first ground of appeal could not succeed. His request was sufficiently and objectively clear.

57. This Appellant is acutely aware of the need to phrase his requests carefully. He has made a number of previous FOIA requests and so has some experience of the process.

The Tribunal did not consider that the Cabinet Office needed to clarify the request or offer any advice or assistance; the parameters were clear.

58. The Cabinet Office confirmed during the internal review that the information redacted was to protect the personal and sensitive information of junior officials who would have a reasonable expectation that their names would not be placed in the public domain. Shared mailboxes details were also redacted relying on section 36(2)(c).

59. All parties had had the benefit of the Qualified Person's opinion in the open bundle and the Minister expressly accepted the advice given to invoke section 36 FOIA. The advice followed a previous, unrelated FOIA request for information about Cabinet Office policy documents. The advice given was specific to the non-disclosure of internal-only team mailboxes. The conclusions of that advice were that disclosure of the email addresses might allow unwarranted email contact which may distract from government business. There were other ways for the public to contact the Cabinet Office. The Tribunal noted that the Cabinet Office can easily be contacted through the gov.uk website.

60. The email from Lord True's Private Secretary on 25th June 2022 confirmed that he was content to adopt section 36(2)(c) as regards internal email boxes on the basis that disclosure would be likely to prejudice effective control of public affairs. Clarification was sought whether the exemption applied to the mailbox in question that was relevant to the FOIA request that invoked that opinion or whether it applied to all shared internal email boxes. The Minister confirmed the exemption applied to all internal shared email boxes.

61. The core issue appeared to be the timing of the Qualified Person's opinion. Both the Appellant and the Commissioner expressed concerns about the timing of the reasonable opinion. The Appellant expressed concern about a blanket approach; the

Commissioner stated that as a matter of law the reasonable opinion must consider the specific request and so could not pre-date the request for information.

62. The submission of the Cabinet referred to the wording of section 36 which continuously referred to the "the information". Subsection (6) also appeared to favour the view that there could be reasonable opinion to cover many requests and it did not need to be obtained on a case-by-case basis –

(6) Any authorisation for the purposes of this section –

(a) may relate to a specified person or to persons falling within a specified class,

(b) may be general or limited to particular classes of case, and

(c) may be granted subject to conditions.

Reading this paragraph naturally, an authorisation may be general. In the Tribunal's view, a general authorisation must include be forward looking to other requests. This subsection also envisaged authorisation for specific people or classes of cases which did not support the Commissioner's interpretation. The Tribunal considered that in the light of subsection (6), an earlier authorisation could generally exempt disclosure if the criteria under subsection (2)(a)-(c) are met and the opinion is reasonable. Indeed, it *may* be unreasonable and not practical to obtain the opinion of the Qualified Person for repeated requests for the same information where a reasonable opinion has already and recently been sought.

63. In this case, the "general" authorisation had been given to a specific type of information, namely, internal email boxes, from any future FOIA requests. The nature of the information sought was limited and easily defined. The reason for withholding that information, whatever the nature of the request for information. The objective was to ringfence the email boxes for internal use and prevent misuse or distraction noting that there were other ways for third parties and the public to contact the Cabinet Office. The passage of time between the opinion being sought, the request for information and any information relevant to that request should be factored into the decision as to whether the Qualified Person's opinion remained reasonable. The Tribunal cautioned that a general authorisation which was

reasonable at the time it was given may become unreasonable. An "old" opinion is likely to face greater scrutiny on that basis alone.

64. Applying weight to the opinion, particularly the detailed submissions sent to the Minster which underpinned the authorisation, and that very little had changed in the intervening seven months since the authorisation was given, the Tribunal considered the authorisation remained reasonable and that the disclosure of internal email boxes would prejudice the conduct of public affairs by having emails sent to those boxes that should not otherwise be there.

65. No party raised the issue that the Qualified Person at the time of the request was not Lord True and the issue whether the reasonable opinion of the Qualified Person must be Qualified Person at the time of the request. Does the reasonable opinion endure after the Qualified Person ceases to be the Qualified Person? In the absence of evidence to the contrary, we have assumed that it does albeit no precedent is set by the Tribunal on that issue and our decision is confined to the particular facts in this case. The Tribunal recognised that this issue and the issue of reasonableness of a previous opinion are issues that have not been litigated before the Upper Tribunal, and so there is no binding case law available to the parties or to this Tribunal.

66. Neither the Appellant nor the Commissioner provided a substantive case as regards the public interest in disclosure as at May 2024 The Appellant stated he wanted an audit trail of the correspondence as opposed to the email inbox addresses themselves. The Tribunal considered the countervailing public interest in requiring disclosure noting that the exemption is engaged. The Tribunal considered that the public at large would have little interest in knowing the internal email boxes of the Cabinet Office; the email addresses themselves would disclose nothing about government affairs and would only allow unfettered access to individuals covering that inbox, whether they were relevant to any email enquiry made or not. Those who sought to contact the Cabinet Office directly (for whatever reason) may have a greater interest in knowing this information. That is likely to be a small number of individuals. To

mitigate that need, there is an ability for the public to make contact with the Cabinet Office through the gov.uk website, by letter or via their MP. No doubt, such enquires to the Cabinet Office are filtered through to the correct individual or department. The Tribunal concluded there was very little public interest in disclosing the email box addresses and that the prejudice that would result from such a disclosure would far outweigh the public interest.

67. On that basis, the Cabinet Office was allowed to rely on the section 36(2)(c) exemption as regards the email inbox addresses of the Cabinet Office, and its appeal against the decision of the Commissioner succeeds. Accordingly and as a result, the Appellant's third ground of appeal fails; his first ground of appeal failed for reason elucidated in paragraphs 53 to 57 above and his appeal is dismissed.

District Judge Moan sitting as a First Tier Tribunal Judge
27th November 2024