



**Case Reference: EA-2023-0018**  
**Neutral Citation Number: [2024] UKFTT 00105 (GRC)**

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Heard by: CVP**

**Heard on: 7 December 2023**  
**Panel deliberations on: 1 February 2024**  
**Decision given on: 06 February 2024**

**Before**

**TRIBUNAL JUDGE SOPHIE BUCKLEY**  
**TRIBUNAL MEMBER MIRIAM SCOTT**  
**TRIBUNAL MEMBER RAZ EDWARDS**

**Between**

**JENNA CORDEROY**

Appellant

**and**

**(1) THE INFORMATION COMMISSIONER**  
**(2) THE HOME OFFICE**

Respondents

**Representation:**

For the Appellant: In person

For the First Respondent: Did not attend

For the Second Respondent: Mr. Henderson (Counsel)

**Decision:** The appeal is allowed in part.

**Substituted Decision Notice – IC-145192-G7Z6**

Organisation: The Home Office

Complainant: Jenna Corderoy

For the reasons set out below:

- (i) There was no challenge to the Commissioner's decision in relation to section 21 and 40(2) of the Freedom of Information Act 2000 (FOIA) and that part of the decision is remade in the same terms. The documents or part documents to which these exemptions relate are identified in annex A.
- (ii) The public authority was not entitled to rely on section 31 to withhold:
  - a. Page 115 of the closed bundle
  - b. Any information replicated in the unredacted part of the PDF document labelled 'Additional response 3 - Attachment 2 - MPS Summary – 14/03/21' previously released by MPS under FOIA.
- (iii) The public authority was entitled to rely on section 31 to withhold the remainder of the documents withheld under section 31 (identified in annex A).
- (iv) The public authority was entitled to rely on section 35 to withhold the documents withheld under that exemption (identified in annex A).
- (v) The public authority was entitled to rely on section 36(2)(b)(i) and (ii) to withhold the documents withheld under those exemptions (identified in annex A).
- (vi) The public authority was entitled to rely on section 24 to withhold the documents withheld under that exemption (identified in annex A).
- (vii) The public authority is required to take the following steps within 42 days of the date this decision is sent to the parties:
  - a. Disclose page 115 of the bundle to the appellant.
- (viii) The public authority is not required to take any steps in relation to (ii)(b) above.
- (ix) Any failure to abide by the terms of the tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

## **REASONS**

### **Introduction**

1. This is an appeal against the Commissioner's decision notice IC-145192-G7Z6 dated 8 December 2022 which held that the Home Office was entitled to withhold certain information relating to the vigil held for Sarah Everard on Clapham Common in relation on sections 31, 35 and 36 of the Freedom of Information Act 2000 ('FOIA').
2. The Home Office now also relies on section 24 FOIA. Section 21 and section 40(2) were also subsequently relied on by the Home Office but are not in issue in this appeal.
3. This matter was heard on 7 December 2023. There were a number of issues that the tribunal noticed during its deliberations which required clarification, additional documentation and/or further submissions. The tribunal is grateful for the parties' efforts in cooperating to provide the additional documentation. Unfortunately this process has led to some delay in promulgation of the decision.
4. This decision contains an open annex A and a closed annex B. Annex B contains a table identifying each withheld document by name/description and the applicable exemption. It contains no closed reasoning. It is necessary for the annex to remain

closed, otherwise the content or the nature of the withheld information would be revealed.

## **Factual background**

5. This appeal relates to the vigil which took place for Sarah Everard on Clapham Common on 13 March 2021. Sarah Everard was murdered by Wayne Couzens, a Metropolitan Police Officer on 3 March 2021. A vigil was planned by an organisation called 'Reclaim the Streets' for 13 March 2021, but organisers cancelled the event after the Metropolitan Police Service (MPS) made public statements to the effect that the Covid-19 regulations in force at the time meant that holding the vigil would be unlawful. A spontaneous vigil took place in any event. The attendance of the MPS at the spontaneous vigil and their actions in dispersing the vigil led to public discussion and significant public criticism.
6. On 30 March 2021 His Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) published its review of the policing of the vigil.
7. Members of Reclaim These Streets brought a judicial review claim against the MPS challenging the policing of the vigil as an unlawful interference with the attendees' rights under Articles 10 and 11 of the ECHR. On 11 March 2022 the Divisional Court handed down its judgment, finding that the MPS' decision making was unlawful.
8. On 28 April 2022 the Police, Crime, Sentencing and Courts Act ("PCSCA") received Royal Assent.

## **Request**

9. On 19 March 2021 the appellant made the following request:

"I would like to request the following information, from 8<sup>th</sup> March 2021 to the day this request is processed:

(1) All internal correspondence and communications held by the Home Secretary Priti Patel which mentions/refers/relates to the Sarah Everard vigil on Clapham Common.

(2) All external correspondence and communications between the Home Secretary and the Metropolitan Police which mentions/refers/relates to the Sarah /Everard vigil on Clapham Common.

By "correspondence and communications", I define this as including, but not limited to:

Emails (and their attachments)

Letters

Briefings

Research documents

WhatsApp messages and other similar communications

Minutes taken during meetings."

10. The Home Office responded on 7 July 2021. It disclosed some information and withheld some information under sections 21(1), 24(1), 31(1)(a), 35(1)(a), 36(2)(b) (i), (b)(ii) and (c), and 40(2). At internal review it upheld its position but no longer relied on section 35.
11. During the Commissioner's investigation the Home Office relied again on section 35 and relied in addition on section 24.

### **Decision notice**

12. In a decision notice dated 8 December 2022 the Commissioner considered the application of sections 31, 35 and 36. The Commissioner held that those sections were engaged and that it was in the public interest to withhold the information.

### ***Section 31(1)(a)***

13. The Commissioner noted that the prejudice relied on by the Home Office was that disclosure would be useful to anyone seeking to use occasions such as the vigil to create disorder and frustrate police operations designed to maintain public order. The Commissioner decided that the claimed prejudice related to the interests which the exemption was designed to protect. He was satisfied that the prejudice was "real, actual or of substance" and that there was a causal link with disclosure, on the basis that it was clearly logical to argue that the disclosure of operational decisions and internal police procedures would make it easier for those intent on criminal activity to commit crime. On that basis the Commissioner concluded that the exemption was engaged in relation to correspondence between the Home Secretary's Private Office, including the Home Secretary herself and MPS.
14. In concluding that the public interest favoured disclosure, the Commissioner acknowledged that disclosure would increase transparency and might shed some light on the policing of the Sarah Everard vigil. He recognised the strong public interest in protecting the ability of public authorities to enforce the law. The Commissioner considered that there was a very substantial public interest inherent in the exemption.

### ***Section 35***

15. Section 35(1)(a) was relied on by the Home Office to protect the need for a safe space for policy formulation and development in relation to a 'fairly recent Bill' (namely the Policing, Crime, Sentencing and Courts Bill) and reach decisions away from external interference and distraction. Having viewed the withheld information, and mindful of the wide interpretation of 'relates to', the Commissioner was satisfied that section 35(1)(a) was engaged. In relation to the public interest balance, the Commissioner concluded, in essence, that the need for a safe space outweighed the public interest in openness and transparency.

### ***Section 36***

16. The Commissioner was satisfied that the Home Secretary is authorised as the qualified person under section 36(5) of FOIA.

17. The Commissioner stated that it was not clear from the submission to the Qualified Person which subset of the information was withheld by virtue of section 36(2)(c), nor how the qualified person considered that the prejudice envisaged by that subsection may arise. Having viewed all the information withheld by virtue of section 36(2), the Commissioner was satisfied that the information clearly represents a free and frank exchange of advice and/or views. He therefore first considered the application of section 36(2)(b)(i) and (ii).
18. The Commissioner accepted that it was reasonable for the qualified person to consider that there was a need to protect the free and frank provision of advice and the free and frank exchange of views, thus avoiding an inhibiting effect on the quality, openness and comprehensiveness of advice to Ministers and of internal and external discussions.
19. In the absence of clear evidence that the qualified person meant ‘would’, the Commissioner accepted that the lower level of prejudice, ‘would be likely to’, was applied.
20. The Commissioner was satisfied that that the overall conclusion of the process was correct. In other words, given the nature of the requested information, the qualified person’s opinion - that inhibition relevant to those subsections would be likely to occur through disclosure of the withheld information - is reasonable. He therefore found that the exemption was engaged in respect of sections 36(2)(b)(i) and (ii).
21. In relation to the public interest balance, the Commissioner noted that the requested information relates to what remained a sensitive topic. He considers this gave weight to the public interest in maintaining the exemption. He considered that disclosure of the information would add little to the overall debate given the information that was already in the public domain. Having accepted the reasonableness of the qualified person’s opinion, the Commissioner gave weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
22. The Commissioner concluded that the public interest in avoiding the inhibition of the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation outweighed the public interest in openness and transparency.

### **Grounds of appeal**

23. The Grounds of Appeal are that the decision notice was wrong because:
  - 23.1. The Commissioner was wrong to conclude that disclosure would be likely to cause prejudice under section 31(1)(a). It is highly unlikely that the police will need to operate and attend vigils or protests in Covid restrictions in the future.
  - 23.2. The Commissioner was wrong to conclude that the information related to the formulation or development of government policy under section 35. The Policing, Crime, Sentencing and Courts Bill received Royal Assent on 28 April 2022 and government formulation and development would have finished.
  - 23.3. The Commissioner was wrong to conclude that disclosure would inhibit free and frank conversations. Priti Patel is no longer Home Secretary and Cressida Dick is no longer head of the MPS.

- 23.4. The Commissioner was wrong not to consider section 24. The appellant is 'struggling to see why this exemption has been applied'.
- 23.5. The names of Ministers, special advisors and senior officials should not be redacted due to data protection.
- 23.6. The Commissioner was wrong in his assessment of the public interest balance. Disclosure would increase transparency and shed light on the policing of the Sarah Everard vigil and would increase transparency in relation to the way the Home Office interacted with the MPS.

## **The Commissioner's response**

### ***Section 31(1)***

24. The Commissioner submits that disclosure would provide recipients with an up-to-date window into the interactions between the Home Secretary/her office and the MPS, in respect of a high-profile and sensitive policing operation that had taken place only six days before the request was made. The disclosure of such information could well (and would be likely to) prejudice the prevention or detection of crime, e.g. by assisting those minded to cause disturbance at major events to understand the interactions between the Home Secretary and relevant police forces, and the operational decision-making and procedures of the police.
25. The Commissioner does not agree that the Covid-19 lockdown, and the 'issue of freedom of speech and assembly', created a 'unique context' which renders the information at issue here unlikely to be useful in future. The salience of the requested information concerns (inter alia) the procedures and nature of decision-making and interaction between the police and the Home Secretary, and that is a matter that is unaffected by the lockdown context.

### ***Section 35(1)(a)***

26. The appropriate time to consider the application of exemptions (and indeed the public interest, if relevant) is the time of the response to the request. At that date, the Bill was 'live'.

### ***Sections 36(2)(b)(i) and (ii)***

27. While Ms Dick had stepped down before the time of the response to the request, the Appellant's request does not encompass (only) correspondence with her. In any event, the relevant question is whether the subject-matter is still 'live'; at the time of the response to the request, issues relating to the policing of the vigil were very much live.

### ***The public interest test***

28. The Commissioner considers that the public interests in maintaining the exemptions are substantial. There is a substantial public interest in avoiding prejudice to the prevention and detection of crime. There is a significant public interest in maintaining confidentiality around 'live' policy matters relating to a Bill that was in the process of development. There is a substantial public interest in protecting the ability of

Ministers, civil servants and the police to maintain a free and frank exchange of views, and provide advice and avoiding a chilling effect on that ability. Those public interests outweigh the public interest in disclosure.

29. In relation to the points raised by the appellant the Commissioner submits that:
- 29.1. the interest in transparency is not as substantial as the Appellant suggests, given the volume of material in the public domain relating to these matters;
  - 29.2. the question of legality has been considered in a judicial review of the relevant decisions, in which process the public authorities involved will have had disclosure/ evidence provision obligations;
  - 29.3. the points made by the Appellant essentially cut both ways. It is precisely in situations where there is a degree of controversiality that the need for a safe space/the avoidance of a chilling effect has weight.

### **Reply by the appellant**

30. The response to the request was received on 7 July 2021. That is the appropriate time to consider the application of exemptions and the public interest.
31. The appellant submits that the public interest in disclosure is significant. She adds that that Priti Patel tweeted: “Some of the footage circulating online from the vigil in Clapham is upsetting. I have asked the Metropolitan Police for a full report on what happened.” Disclosure would allow the public to fully examine what exactly occurred behind closed doors.
32. On 1 July 2021, an All-Party Parliamentary Group on Democracy and the Constitution found that the Metropolitan Police breached fundamental rights in the handling of the Sarah Everard vigil.
33. Furthermore, up until 7 July 2021, Priti Patel has been criticised over the way she has been discussing protests in general. In February 2021, she described the Black Lives Matter demonstrations as “dreadful”, which was met with criticism. The publication of the police, crime, sentencing and courts bill in March 2021 was also met with criticism, with commentators highlighting the restrictions it would impose on protests.
34. The appellant argues that when there is an element of controversiality, then more weight needs to be placed on public interest considerations in favour of disclosure.

### **Response of the Home Office**

35. The Home Office understands that the appellant is not appealing the application of section 21. 26 of the 55 documents which were identified as falling within the scope of the request were considered to be exempt under section 21.
36. Section 24(1) was only relied upon in relation to two documents. These are documents covering a large number of issues, which refer only very briefly to the Sarah Everard vigil in a small section. The information about the vigil is already in the public domain and would be covered by s.21(1) in any event, but disclosure of the

format of the documents and some of the rest of their contents would potentially damage national security.

37. Section 40(2) has been relied upon simply to protect the identity of junior HO officials, an adviser and a member of the public who contacted the HO about the Sarah Everard vigil.

### ***Section 31(1)***

38. The information withheld in reliance on s.31(1) concerns correspondence about operational decisions by the police and internal police procedures. The relevant information is not specific to the lockdown, but rather relates more broadly to the way in which the police manage and coordinate responses to protests and communicate their decision-making to Government. Disclosure is likely to be useful to persons who would seek to create disorder or frustrate police operations.

### ***Sections 35(2)(a) and 36(2)(b)(i) and (ii)***

39. The Home Office agrees with the Commissioner's response.

### ***Public interest in relation to section 35(1)(a) and 36(2)***

40. The Home Office accepts that there is an important public interest in transparency and accountability generally around policing, and in the particular issue of the policing of protests. The high-profile nature of the Sarah Everard vigil, and the wider context of serious concerns being raised about misogyny within the Metropolitan Police Service, mean that this public interest is heightened.
41. The Home Office submits that there is a very large volume of material in the public domain already relating to these matters. There was a widely-reported and comprehensive judicial review claim<sup>1</sup> and in the judgment of the Court many of the salient and material points contained in the withheld information were explored, explained and analysed at length. This significantly reduces the public interest in disclosure of the information.
42. There is a significant public interest in avoiding prejudice to the prevention and detection of crime, in maintaining confidentiality around ongoing policy decision-making and development of policy, and in protecting a safe space for the free and frank exchange of views, especially in a rapidly evolving situation. The Home Office submits that when these well-understood and well recognised public interests are weighed against the public interest in disclosing this specific information, in the context of an incident which has been already been explored and debated exhaustively in the media, in the courts and in the public domain more broadly, it is clear that the public interest in maintaining the exemptions should take precedence.

### **Reply of the appellant**

43. The appellant confirms that she is not appealing the application of section 21. She asks if any documents that are now in the public domain can be disclosed.

---

<sup>1</sup> Leigh and others v. Commissioner of Police of the Metropolis [2022] EWHC 527 (Admin)



44. The appellant confirms that she does appeal in relation to section 24(1).
45. The appellant confirms that she is not appealing in relation to section 40(2).

**Evidence and gist of closed session**

46. We read an open and a closed bundle. We also took account of the additional documentation provided by the parties by email dated 24 January 2024. This documentation was provided following the hearing in response to an order of the tribunal.
47. The bundles include an open and a closed witness statement from Ruth Hasling, from the Home Office, Deputy Director responsible for the Parliament, Legislation and External Affairs Unit and an open witness statement from the appellant.
48. We heard oral evidence from Ruth Hasling in an open and closed session.
49. Other than the closed witness statement and exhibits, the closed bundle consists of:
  - 49.1. A closed version of the ministerial submission requesting the application of section 36 FOIA
  - 49.2. A closed version of the Home Office's response to the Commissioner's request for information.
50. The closed exhibits to the witness statement are the withheld information.
51. It is necessary to withhold the above information because it either is the withheld information or refers to the content of the withheld information, and to do otherwise would defeat the purpose of the proceedings.
52. We held a short closed session at the start of the hearing, in which Mr. Henderson was simply asked to and did identify the documents in relation to which section 21 applied.
53. The following is a gist of the main closed session, prepared by the parties and approved by the tribunal:

“Ms Hasling confirmed the truth of her CLOSED statement and asked for it to stand as her evidence.

The Panel then asked questions of Ms Hasling in relation to the following points:

- a. On s.24 (national security) Ms Hasling was asked to identify the relevant parts of the documents which referred to the Sarah Everard vigil and what their source was. She then explained the sensitivity of the documents as a whole and what the damage to the public interest would be if they were disclosed. She was also asked the question the Appellant had raised in OPEN as to whether the documents could be disclosed in redacted form. She explained that it was disclosure of the very existence of the particular documents that risked damaging national security.

- b. There were no questions on s.35.
  - c. On s.31 Ms Hasling was asked to give examples from the documents in relation to which this exemption was said to apply about how their content could prejudice the prevention or detection of crime if it were disclosed.
  - d. On s.36 Ms Hasling was asked to identify some examples in the documents of frank provision of advice to ministers in relation to which there was a public interest in preserving a confidential and safe space.
  - e. Ms Hasling was asked to identify any parts in the documents which were potentially relevant to the public interest in transparency identified in the Appellant’s skeleton.
  - f. Finally, Ms Hasling was asked to comment on the sections of the documents to which s.21 partially applied in relation to which an s.36 exemption was claimed, and explain what (if anything) was relevant or sensitive about them.
- Mr Henderson made brief submissions following on from the questions.”

**The law**

54. The relevant parts of sections 1 and 2 FOIA provide:

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

Effect of the exemptions in Part II.

.....

2(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—  
 (a) the information is exempt information by virtue of a provision conferring absolute exemption, or  
 (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

55. **APPGER v Information Commissioner and Foreign and Commonwealth Office** [2016] AACR 5 gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out:

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

***Section 24(1) FOIA***

56. Section 24(1) FOIA provides as follows:

“Information which does not fall within section 23(1) [*information supplied by, or relating to, bodies dealing with security matters*] is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.”

### ***Section 31 FOIA***

57. Section 31 FOIA provides a qualified exemption subject to the public interest test in respect of information relevant to specific areas of law enforcement:

“(1) Information which is not exempt information by virtue of section 30 [*investigations and proceedings conducted by public authorities*] is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention and detection of crime,  
...

58. The exemption is prejudice based. ‘Would or would be likely to’ means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

### ***Section 35(1)(a) FOIA***

59. Section 35(1)(a) FOIA provides as follows:

“35 Formulation of government policy, etc.  
(1) Information held by a government department ... is exempt information if it relates to—  
(a) the formulation or development of government policy”

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

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

62. The question of whether the policy-making process is still ‘live’ is an issue that goes to the assessment of the public interest balancing test, and not to whether the section

35(1)(a) exemption is engaged in the first place (**Morland v Cabinet Office** [2018] UKUT 67 (AAC)).

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

“(iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.

(v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, section 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances. As is plain however, we do not regard a “seamless web” approach to policy as a helpful guide to the question whether discussions on formulation are over.”

64. The public interest can wax and wane and the need for a safe space changes over time in relation to development of policy.
65. If disclosure is likely to intrude upon the safe space then there will, in general terms, be significant public interest in maintaining the exemption, but this has to be assessed on a case by case basis.
66. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect, in this case the efficient, effective and high-quality formulation and development of government policy.

67. In relation to ‘chilling effect’ arguments, the tribunal is assisted by the following paragraphs from the Upper Tribunal decision in **Davies v IC and The Cabinet Office** [2019] UKUT 185 (AAC):

“25. There is a substantial body of case law which establishes that assertions of a “chilling effect” on provision of advice, exchange of views or effective conduct of public affairs are to be treated with some caution. In *Department for Education and Skills v Information Commissioner and Evening Standard* EA/2006/0006, the First-tier Tribunal commented at [75(vii)] as follows:

“In judging the likely consequences of disclosure on officials’ future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly-educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department’s position, whether or not it is their own.”

26. Although not binding on us, this is an observation of obvious common sense with which we agree. A three judge panel of the Upper Tribunal expressed a similar view in *DEFRA v Information Commissioner and Badger Trust* [2014] UKUT 526 (AC) at [75], when concluding that it was not satisfied that disclosure would inhibit important discussions at a senior level:

“75. We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it...

76. ...They and other organisations engage with, or must be assumed to have engaged with, public authorities in the full knowledge that Parliament has passed the FOIA and the Secretary of State has made the EIR. Participants in such boards cannot expect to be able to bend the rules.”

27. In *Department of Health v Information Commissioner and Lewis* [2015] UKUT 0159 (AAC), [2017] AACR 30 Charles J discussed the correct approach where a government department asserts that disclosure of information would have a “chilling” effect or be detrimental to the “safe space” within which policy formulation takes place, as to which he said:

“27. ...The lack of a right guaranteeing non-disclosure of information ...means that that information is at risk of disclosure in the overall public interest ... As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that ... a

person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed...

28. ...any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest.

29. ... In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way:

i) this weakness, ... is flawed.”

28. Charles J discussed the correct approach to addressing the competing public interests in disclosure of information where section 35 of FOIA (information relating to formulation of government policy, etc) is engaged. Applying the decision in *APPGER* at [74] – [76] and [146] – [152], when assessing the competing public interests under FOIA the correct approach includes identifying the actual harm or prejudice which weighs against disclosure. This requires an appropriately detailed identification, proof, explanation and examination of the likely harm or prejudice.

29. Section 35 of FOIA, with which the *Lewis* case was concerned, does not contain the threshold provision of the qualified person’s opinion, but these observations by Charles J are concerned with the approach to deciding whether disclosure is likely to have a chilling effect and we consider that they are also relevant to the approach to an assessment by the qualified person of a likely chilling effect under section 36(2) and so to the question whether that opinion is a reasonable one.

30. Charles J said at [69] that the First-tier Tribunal’s decision should include matters such as identification of the relevant facts, and consideration of “the adequacy of the evidence base for the arguments founding expressions of opinion”. He took into account (see [68]) that the assessment must have regard to the expertise of the relevant witnesses or authors of reports, much as the qualified person’s opinion is to be afforded a measure of respect given their seniority and the fact that they will be well placed to make the judgment under section 36(2) – as to which see *Malnick* at [29]. In our judgment Charles J’s approach in *Lewis* applies equally to an assessment of the reasonableness of the qualified person’s opinion as long as it is recognised that a) the qualified person is particularly well placed to make the assessment in question, and b) under section 36 the tribunal’s task is to decide whether that person’s opinion is substantively reasonable rather than to decide for itself whether the asserted prejudice is likely to occur. Mr Lockley agreed that the considerations identified by Charles J were relevant. We acknowledge that the application of this guidance will depend on the particular factual context and the particular factual context of the *Lewis* case, but that does not detract from the value of the approach identified there.”

### ***Section 36***

68. Section 36 provides in material part that:

“36 Prejudice to effective conduct of public affairs

(1) This section applies to—

(a) information which is held by a government department ... and is not exempt information by virtue of section 35, and

...

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

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

(i) the free and frank provision of advice, or

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

...”

69. It is for the tribunal to assess whether the qualified person’s (QP’s) opinion that any of the listed prejudices/inhibitions would or would be likely to occur is reasonable, but that opinion ought to be afforded a measure of respect: **Information Commissioner v Malnick** [2018] UKUT 72 (AAC), [2018] AACR 29 at paragraphs 28-29 and 47.

70. It is not an absolute exemption.

## **Open oral/written submissions and open skeleton arguments**

### ***Skeleton argument of the appellant***

#### *Section 31(1)(a)*

71. The appellant does not believe that the information requested would be useful to anyone seeking to create disorder and frustrate police operations, since the operational decisions and police procedures of the vigil were unique and that it is highly unlikely Covid restrictions will be reintroduced.

#### *Section 35(1)(a)*

72. The Bill received royal assent in April 2022 and policy formulation and development has concluded.

#### *Section 36(2)(b)(i) and (ii)*

73. As Home Secretary Priti Patel and Metropolitan Police Commissioner Dame Cressida Dick have left their positions, release of the information would not inhibit free and frank conversations as they are no longer in charge of these authorities.

#### *Section 24*

74. The appellant submits that it is worth examining whether section 24 applies. It is a qualified exemption, and she has raised numerous public interest arguments in favour of disclosure.

### *The public interest*

75. The appellant relies on the following:
- 75.1. A disclosure would increase transparency and shed light on the policing of the Sarah Everard vigil, especially in the run up to the vigil. The release of documents would allow the public to see whether any of the parties discussed whether a vigil could be allowed to go ahead if there was social distancing.
  - 75.2. A disclosure would also allow the public to assess whether the Home Office and the Metropolitan Police discussed the risk of Covid transmission or the risk of violence if the police intervened.
  - 75.3. A disclosure would shed light on whether the issue of human rights was raised, and how much time the relevant parties dedicated to discussing human rights.
  - 75.4. A disclosure would increase transparency in the way the Home Office interacted with the Metropolitan Police Service, particularly over the scenes that emerged on 13<sup>th</sup> March 2021.
  - 75.5. An All-Party Parliamentary Group on Democracy and the Constitution found that the Metropolitan Police breached fundamental rights in the handling of the vigil.
  - 75.6. The government has been criticised over the way it deals with protests. For instance, the publication of the Police, Crime, Sentencing and Courts Bill in March 2021 was met with criticism.

### *Information in the public domain*

76. The appellant asks whether any of the withheld information is now in the public domain, and whether this can now be disclosed.

### ***Skeleton argument of the Home Office***

#### *Application of sections 21(1), 24(1) and 40(2)*

77. The Appellant has confirmed that she is not appealing the application of s.21 information reasonably accessible otherwise – to the information withheld [46 §3]. This applies to 26 of the 55 documents, as at 7 July 2021. It would also apply to two other documents and part of a further document now (see §§10-11 of Ruth Hasling’s statement on behalf of the HO [372, C/25]).
78. The application of s.40(2) is not being appealed.
79. The Appellant does still challenge the application of s.24(1) – national security [47 §§4-7]. As set out in Ms Hasling’s statement [372-373, C/25-26 §§12-15] the documents to which this exemption applies are wide-ranging documents covering many entirely unrelated matters. The format and existence of these documents is sensitive. They refer only very briefly to the Sarah Everard vigil in a small section and the information contained therein is already in the public domain. For these reasons there is no discernible public interest in disclosure, and a strong public interest in applying the exemption.



*Application of section 31(1)*

80. The withheld information relates to the way in which the police manage and coordinate public protests and communicate their decision making to Government. Whilst the focus of the correspondence was the vigil, much of its content related to the policing of protests more generally. Although events post July 2021 are irrelevant to the task this Tribunal needs to undertake, the Divisional Court Judgment and the passages of the PCSCA illustrate that the way in which the vigil was policed was not unique due to the coronavirus regulations then in place and show that there has already been extensive public discussion and debate about all of these issues. For the reasons set out in Ms Hasling's witness statement it is submitted that the balance of public interest falls down on the side of non-disclosure.

*Application of sections 35(1)(a) and 36(2)(b)*

81. The Home Office adds little to the submissions already made.

*Public interest in relation to sections 35(1)(a) and 36(2)*

82. The fact that a subject is high profile and of significant media interest does not necessarily imply there is a compelling public interest in disclosure of specific information relating to it. The information contained in the relevant documents to which these exemptions apply is not revelatory and adds little to what is already known through media stories and the Divisional Court judgment.
83. There is a significant public interest in maintaining confidentiality around ongoing policy decision-making and development of policy, and in protecting a safe space for the free and frank exchange of views, especially in a rapidly evolving situation.
84. The Home Office submits that when these public interests are weighed against the public interest in disclosing this specific information, in the context of an incident which has already been explored and debated exhaustively in the media, in the courts and in the public domain more broadly, it is clear that the public interest in maintaining the exemptions should take precedence.

***Open written submissions from the Commissioner***

85. The request has been interpreted broadly by the Home Office. As a result much of the material has little to do with the appellant's public interest arguments.

*Section 31(1) FOIA*

86. The withheld information concerns correspondence between the Home Secretary, her Private Office and the MPS relating to operational decisions and internal police procedures. There are 5 such documents.
87. The Commissioner submits that these are direct, frank communications in the context of 'live' police operations. In addition to the points made in the response the Commissioner submits that disclosure would be likely to affect the speed and candour

of such interactions in future when the need for direct frank communication in such a context is obvious.

*Section 35(1)(a) FOIA*

88. The Commissioner submits that section 35(1)(a) is engaged in respect of two documents that relate to a Bill that was at that time before Parliament.

*Section 36(2)(b)(i) and (ii) FOIA*

89. A considerable number of documents are withheld under these exemptions, as set out in paragraph 23 of Ruth Hasling's witness statement.
90. In her skeleton the appellant has reformulated her point about Cressida Dick and Priti Patel no longer being in post as aimed at the question of future prejudice. The Commissioner submits that the risk of future inhibition does not depend on the identity of the particular Home Secretary or Commissioner in post.

*Public interest*

91. In addition to the points made in the response, the Commissioner notes that both the Home Office and the appellant have referred to statements made in Parliament. The tribunal may receive evidence of proceedings in Parliament if relied upon as historical facts or events but should not assess the accuracy or correctness of statements made in Parliament or by Parliamentary committees.

***Oral submissions by the appellant and the Home Office***

92. The appellant and Mr Henderson both made clear and helpful oral submissions which emphasised and amplified the points that they had made in their written submissions and which the tribunal took into account in full.

***Additional written submissions***

93. We took account of additional written submissions provided to the tribunal in accordance with the tribunal's order after the hearing.

**The role of the tribunal**

94. The tribunal's remit is governed by section 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

**Discussion and conclusions**

95. The issues we have to determine are:

- 95.1. In relation to the relevant parts of the withheld information is exemption from section 1(1)(b) FOIA required for the purpose of safeguarding national security?
- 95.2. In relation to the relevant parts of the withheld information, would disclosure of the information be likely to prejudice the prevention and detection of crime?
- 95.3. In relation to the relevant parts of the withheld information, does it relate to the formulation or development of government policy?
- 95.4. In the reasonable opinion of a qualified person, would disclosure of the information or would disclosure of the information be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation?
- 95.5. Does the public interest in maintaining any exemptions that are engaged outweigh the public interest in disclosure?

***The time for assessment of the public interest balance***

- 96. The relevant date for the purposes of this appeal is 7 July 2021.

***Section 35 – formulation or development of government policy***

- 97. This exemption is applied to two documents.

*Does the withheld information relate to the formulation or development of government policy?*

- 98. These documents relate to the Policing Sentencing and Courts Bill, which was laid before parliament on 9 March 2021. The Bill received Royal Assent on 28 April 2022. Having read those two documents we find that the information clearly relates to the formulation and development of government policy and the exemption is therefore engaged.

*Does the public interest in disclosure outweigh the public interest in maintaining the exemption under section 35?*

- 99. The purpose of section 35 is to protect the effective, efficient and high-quality formulation and development of government policy and to protect good government. It reflects and protects some longstanding constitutional conventions of government. It reserves a safe space to consider policy options in private – civil servants and subject experts need to be able to engage in free and frank discussion of all the policy options internally, to be able to expose their merits and demerits and possible implications. It is in the public interest that officials and ministers have “time and space...to hammer out policy exploring safe and radical options alike, without the threat of lurid headlines depicting what has merely been broached as agreed policy” (DfES para 75(iv), approved in OGC).
- 100. Under section 35 there is no space where confidentiality can be assured because it is not an absolute exemption and the need for a safe space is much greater when development of that policy is nearer the live end of the spectrum at the relevant date. We accept that the ‘liveness’ of a policy is not black and white. Further we accept

that the public interest in maintaining a safe space waxes and wanes and does not evaporate the moment a policy is announced.

101. In considering the weight of the safe space in this appeal, we have taken particular account of the following. The Bill was laid before Parliament on 9 March 2021. By that stage a large part of the policy formulation and development process would have concluded. However, the Bill still had to progress through parliament, and was not finalised until 12 months after the response to the request. In July 2021 we accept that the policy development process was still live. In those circumstances we place very significant weight on the importance of preserving a safe space.
102. We accept that there is a general public interest in transparency in relation to the development of government policy. We accept that there is increased public interest in transparency in relation to this particular Bill, because the publication of bill in March 2021 was met with public criticism, with commentators highlighting the restrictions it would impose on protests. We accept that there is a public interest in transparency in relation to the influence, if any, that the issues surrounding the Sarah Everard vigil had not the development of government policy in this area.
103. Having read the documents we accept that disclosure could contribute to a limited extent to an informed debate on these issues, but the documents add little to the speeches that were publicly made in the House of Commons at the time.
104. Overall we conclude that the very significant public interest in preserving a safe space while policy development is live outweighs the public interest in disclosure.

### ***Section 31 – prevention and detection of crime***

105. This exemption applies to five documents in the closed bundle.  
*Would disclosure of the withheld information be likely to prejudice the prevention and detection of crime?*
106. We deal first with page 115 of the closed bundle. The tribunal indicated in an order dated 15 December 2024 its provisional view that page 115 does not, in general, contain operationally sensitive information which might have been prejudicial if disclosed at the relevant time, and was largely in the public domain at the relevant time in any event (see p244-25 in the open bundle). The Home Office indicated by letter dated 19 January 2024 that it was content for that page to be provided to the appellant with the email address and telephone number redacted, subject to Home Office notifying the author of that page that it is to be disclosed in advance of that disclosure taking place.
107. We maintain our provisional view and we are not satisfied that there is a causative link between disclosure of page 115 and the claimed prejudice and find that the Home Office was not entitled to rely on section 31 to withhold that document. We have ordered disclosure, subject to redactions for personal information. The Home Office will be able to notify the author in advance of disclosure as requested.
108. We now turn to the remainder of the documents withheld under section 31. These documents are, or relate to, communications between the Home Secretary's private

office, or the Home Secretary herself and MPS. Having reviewed the documents we accept that, looked at as whole, they relate to operational decisions and internal police procedures.

109. Although some of those decisions and procedures are unique to the context of covid/the Sarah Everard vigil, some of them are not. In relation to those that are specific to the covid context or specific to this vigil, we accept that, read as a whole, they still provide insight into how MPS manages and coordinates responses to situations outside this specific context.
110. We had not been provided with evidence of the views of MPS on the risks that release of this particular information would cause, and we note that Ms Hasling, as Deputy Director for the Parliament, Legislation and External Affairs Unit, does not appear to have any specific expertise in this area albeit that she works in the Home Office.
111. Following the hearing we ordered the appellant and the second respondent to cooperate to provide any responses of MPS to similar requests for information made to MPS at or around the same time as the request under consideration in this appeal. We note from those responses that the MPS considered that information about the size/type of police deployments, tactics and pressures on resources could assist potential offenders or hostile actors to cause disruption, evade police and ultimately adversely affect the prevention and detection of crime.
112. We also note from the above responses by the MPS that the majority of the substantive content of the documents withheld under section 31 is contained in a document that was public at the relevant time, subject to minor redactions. That is a PDF document labelled 'Additional response 3 - Attachment 2 - MPS Summary – 14/03/21' (the MPS Summary) which was released to the world under FOIA by MPS on a number of occasions including, for example in June 2021.
113. Where the withheld information replicates or reproduces unredacted information that was released by MPS in that document, we do not accept that section 31 is engaged because we do not accept that there is a causative link. First this is because in our view, MPS is in a better position than the Home Office to judge the potential for harm being caused by release in relation to this particular information, and second, that information had already been released under FOIA prior to the relevant date, so any harm would have already been caused.
114. The rest of the information withheld under section 31 is limited. In relation to that limited information, based on the above, and as a matter of common sense, we accept that insight into how MPS manages and coordinates responses to disturbances at protests or vigils is likely to be of at least some assistance to those that seek to create disorder and frustrate police action on similar occasions. In reaching this decision we have placed some weight on the fact that MPS took this view in relation to the limited redactions that they made to the MPS summary.
115. On this basis, we accept that there is a real and significant risk that the information that has not been made public, read as a whole, would be useful to individuals seeking to use similar occasions to create disorder and frustrate police operations

designed to maintain public order. We accept that this harm relates to the interests protected by the exemption.

116. For those reasons, in relation to the information that was not already publicly available, we accept that there is a real and significant risk of prejudice to the prevention and detection of crime. We accept that the Home Office has shown that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance.
117. In relation to the information that was already publicly available in the MPS Summary, the Home Office would have been entitled to rely on section 21. They did not, presumably because they were not aware that this specific information was in the public domain. However, we note that Ms Corderory and the wider public already have access to this information and therefore although the section 31 exemption relied on is not available to the Home Office we exercise our discretion not to order disclosure.

***Does the public interest in disclosure outweigh the public interest in maintaining the exemption under section 31?***

118. We accept that there is an extremely significant public interest in not prejudicing the prevention and detection of crime, and in particular in not reducing the police's ability to maintain public order.
119. Having reviewed the particular information, as set out above we do not think the fact that it was produced in the context of covid restrictions would limit its usefulness, because the insights it gives into police operations when read as a whole are likely to be of more general application. Information such as general tactics, the number of officers or the type of resources deployed is likely to be useful information in any event.
120. However having considered the specific nature and content of the information we consider that there is only a fairly moderate risk of the information being of any real use to those intending to create disorder and frustrate police operations. For that reason we find the public interest in withholding the information is reduced. In our view there is still a very significant public interest in preventing even a fairly moderate risk of prejudice to the prevention and detection of crime.
121. We accept that there is a general public interest in transparency and accountability in relation to the policing of protests, and the policing of protests during the covid pandemic. We accept that this is increased in relation to the Sarah Everard vigil, and that there is a public interest in accountability in the light of the judicial review issued on 12 March 2021 and the concerns raised in the press and a matter of public debate at the time.
122. We accept that there is a specific public interest in transparency in relation to the content of any direct discussions between Priti Patel and Cressida Dick ahead of and during the vigil, and the content of any advice that Priti Patel gave to Cressida Dick.

123. We accept that there is a specific public interest in transparency in relation to the content of any discussions between MPS and the home secretary or the Home Office about human rights issues in the context of the policing of protests and covid restrictions.
124. We accept that there is a specific public interest in relation to transparency around any statement to the MPS by or on behalf of the Home Secretary to the effect that she would discourage people from attending the vigil, or any statement that was contradictory to her later tweet ('some of the footage circulating online from the vigil in Clapham is upsetting. I have asked the Metropolitan Police for a full report on what happened').
125. We accept that these public interests are increased because of the public debate and/or criticism in relation to the home secretary's approach to protests in general and the publication of the Police, Crime, Sentencing and Courts Bill in March 2021.
126. The fact that there is a public interest in transparency or accountability in relation to the above issues, does not necessarily mean that there is public interest in the disclosure of this particular information. The appellant is at a disadvantage, because she has not seen the information. She can only speculate as to what public interests would be furthered by disclosure of this particular information.
127. The question of whether disclosure of the withheld information would further the public interests accepted by the tribunal depends, as Upper Tribunal Judge Jacobs recognised at paragraph 30 of **Ofqual v Information Commissioner** [2023] UKUT 253, on the nature and content of the information. That is the starting point.
128. Having reviewed the documents withheld under section 31 we accept that they would have contributed to the general public interest in transparency and accountability to some extent in relation to the policing of protests generally, during the covid pandemic and in relation to this particular vigil, in relation to which the police had faced particular criticism.
129. In terms of the other specific points raised by the appellant set out above, the tribunal has read the information withheld under section 31 and we find that the contribution to public debate from the withheld information being released in July 2021 would have been non-existent in some cases and very limited in others. It does not illuminate any of the specific matters raised by the appellant to any significant extent. Any small references that there are to relevant matters in the withheld information do not, in any significant way, take the matters any further than the information that was already in the public domain in July 2021.
130. We note that in terms of transparency and accountability and questions of legality in relation to policing decisions taken *before* the vigil, the value which would be added by the publication in July 2021 of the requested information withheld under this exemption pales into insignificance compared to the information held by the Police that was subject to detailed scrutiny by the court in a future public judgment in **R (on the application of Leigh) v Commissioner of Police of the Metropolis**.

131. In accordance with **Ofqual v Information Commissioner** [2023] UKUT 253 we do not take account of that information (except to the extent that it overlaps with information that we refer to below as being already in the public domain at the time of the response). The information referred to in the judicial review that was not in the public domain at the time of the response, cannot be taken account of on the basis that it was ‘known... to be entering the public domain imminently’ (see para 35 of **Ofqual**).
132. However, it illustrates that there were, at the relevant time, other more effective means available for ensuring transparency and accountability of the actions of the Police, because the Police held a large quantity of more relevant information on the steps taken leading up to the vigil. As a matter of logic, although this was not the issue in the judicial review, the Police would also hold much more relevant information on the steps taken by the Police on the day and afterwards. This supports our view that the limited information held by the Home Office only assists to some extent in contributing to public debate and transparency/accountability on this issue.
133. The judicial review is, in our view, relevant in one other way. Although the decision was not handed down until 11 March 2022, the judicial review was already in progress in June 2021. We take account of the fact that it was known at the relevant time that this judicial review was specifically focussed on the decision-making processes and the legality of the police actions before the vigil, and the issues of the right to protest. There were therefore, in July 2021, already processes in motion which would be likely to contribute significantly to accountability and transparency in relation to the actions of the police, and to the public interest in understanding the extent to which human rights and the issue of measures to mitigate health risks formed or did not form part of the decision making process in a way which the withheld information, because of its nature and content, does not.
134. Further there was a significant amount of information already in the public domain at the time in the form of public statements and/or press releases/FOIA releases from MPS and/or public statements from the Home Secretary. As we have noted above, most of the information in these documents was already in the public domain.
135. In the light of all this, although there was a very clear public interest in transparency and accountability at the relevant time, the public interest in disclosure of this specific information was lower because of the specific content of the information and the limited light that it casts on the particular issues raised by the appellant, the other information already available in the public domain and in the light of the already in progress judicial review of the actions of the police prior to the vigil.
136. Looked at as whole, for the reasons set out above, we find that the public interest in maintaining the exemption outweighs the public interest in disclosure of this particular information.

***Section 36(2)(b)(i) and (ii)***

***In the reasonable opinion of a qualified person, would disclosure of the information or would disclosure of the information be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation?***



137. We accept that the qualified person has given her opinion that disclosure would, or would be likely to, inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation by agreeing to the ministerial submission dated 21 June 2021.
138. We must focus on the substantive reasonableness of that opinion, rather than the process by which it was reached. We bear in mind that our role is restricted to considering whether the qualified person's opinion is reasonable rather than whether or not we agree with it. In considering the effect of disclosure we have read and considered each item withheld by the Home Office under this heading.
139. Having reviewed the withheld information and having heard closed evidence from Ms Hasling in relation to a number of specific examples of that information, we are satisfied that that opinion was reasonable for the following reasons.
140. We take account of the fact that the Home Secretary is well placed to make the assessment and we take account of her level of seniority.
141. In assessing the substantive reasonableness of the opinion, we bear in mind that a degree of circumspection about reliance on a 'chilling effect' is justified where there is simply an assertion that that is what will occur. We bear in mind that civil servants can be expected to act with courage and independence.
142. This does not mean that the threshold can never be discharged (particularly given the low degree of likelihood required), nor that it cannot properly be discharged on the basis of evidence setting out the basis of the view that such a chilling effect will occur (see para 138 *DfT v ICO and Alexander* [2021] UKUT 327 (AAC)).
143. Further we note that the explicit purpose of s 36(2)(b)(i) and (ii) is to protect the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberations. Its purpose is to avoid a 'chilling effect' on that free and frank exchange of views or provision of advice.
144. At the time of the response to the request, the question of how to police the Sarah Everard vigil in the light of the extant covid restrictions was no longer live, in the sense that the vigil had happened and those decisions had been made by MPS.
145. However, a number of related matters remained live in July 2021. The issue remained part of ongoing public debate. Wayne Couzens had submitted a guilty plea in July 2021 but was not sentenced until September 2021. The Police, Crime and Sentencing Bill was going through parliament. The related judicial review was ongoing. COVID restrictions were ongoing. The policing approach to the Sarah Everard vigil during covid restrictions remained a sensitive, difficult and controversial issue.
146. Where topics are sensitive, difficult and controversial, it is not simply a lack of courage or independence on the part of the individual civil servant which might inhibit free and frank exchanges of views or of advice.

147. We take account also of the (i) the type of communications (ii) the nature of the discussions, in terms of formality, purpose and subject matter (iii) the fast moving context and (iv) the identity of the parties to those communications. It is important, in the light of all these factors, to have a safe space in these particular types of communications to explore ideas and approaches to difficult issues without having to focus on what information might be deemed acceptable in the future at the point at which those emails became publicly available or on what the consequences might be on the public perception of the Home Office or the Home Secretary.
148. The chilling effect is not limited to the impact on Cressida Dick or Priti Patel. It applies to any officials undertaking these type of communications and therefore the fact that they were or are no longer in post is not relevant.
149. That does not mean that these types of communications can never be disclosed nor that there is any kind of blanket exemption. In terms of a chilling effect, in our view, all the authors of the documents which form part of the withheld information, would have been aware that there was no absolute guarantee of confidentiality, because of FOIA, and the possibility that there might be a public interest in disclosure that outweighs the public interest in withholding the information. Nonetheless, we find that there would have been a generalised common assumption of confidentiality given (i) the type of communications (ii) the nature of the discussions, in terms of formality, purpose and subject matter and (iii) the parties to those communications.
150. For all those reasons we accept that the opinion was substantively reasonable and the exemption is engaged.

*Does the public interest in disclosure outweigh the public interest in maintaining the exemption under section 36(2)(b)(i) or (ii)?*

151. Although we have considered the exemptions under the same heading we have not aggregated the public interest in the sense that we have not added the public interest in not prejudicing the free and frank exchange of views to the public interest in prejudicing the free and frank provision of views.
152. Our primary focus when considering the public interest in maintaining the exemption is on the particular interest which the exemption is designed to protect, in this case avoiding prejudice to the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
153. In assessing the public interest balance we have to reach our own view on whether the protected interests would or would be likely to be inhibited or prejudiced and the severity, extent or frequency of such inhibition and prejudice. In doing so we give respect and weight to the opinion of the qualified person as an important piece of evidence.
154. We have made findings relevant to these issues when considering the reasonableness of the opinion of the qualified person above. In particular we take account of our findings as to the importance of a safe space in this particular case, and our finding that related issues remained live at the date of the request, even though the immediate decisions had already been taken. On this basis we accept that there was very

significant public interest in July 2021 in maintaining a ‘safe space’ for these type of discussions and communications to take place to enable the Home Office to work efficiently and effectively.

155. Having considered the withheld material, we find that its disclosure would be likely to cause a chilling effect and impact on this safe space irrespective of the specific wording of any particular email because of the particular features of these types of communications that we have highlighted above.
156. In summary we accept that there was a continuing need for a safe space in July 2021 and the release of any of this information at that date would have led to a clear risk, in these particular circumstances, of a chilling effect prejudicing the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
157. We think there is a very strong public interest in avoiding such a chilling effect and the impact on the safe space within which the relevant individuals can either freely exchange views or give frank advice. In relation to both exemptions, looked at separately, there is a very strong public interest in maintaining the exemption.
158. In terms of the public interest in disclosure, some of the relevant factors have already been set out above, so there is some repetition in the passages that follow.
159. We accept that there is a general public interest in transparency and accountability in relation to the policing of protests, and the policing of protests during the covid pandemic. We accept that this is increased in relation to the Sarah Everard vigil, and that there is a public interest in accountability in the light of the judicial review issued on 12 March 2021 and the concerns raised in the press and a matter of public debate at the time.
160. We accept that there is a specific public interest in transparency in relation to the content of any direct discussions between Priti Patel and Cressida Dick ahead of and during the vigil, and the content of any advice that Priti Patel gave to Cressida Dick.
161. We accept that there is a specific public interest in transparency in relation to the content of any discussions between MPS and the home secretary or the home office about human rights issues in the context of the policing of protests and covid restrictions.
162. We accept that there is a specific public interest in relation to transparency around any statement to the MPS by or on behalf of the Home Secretary to the effect that she would discourage people from attending the vigil, or any statement that was contradictory to her later tweet (‘some of the footage circulating online (from the vigil in Clapham is upsetting. I have asked the Metropolitan Police for a full report on what happened’’).
163. We accept that these public interests are increased because of the public debate and/or criticism in relation to the home secretary’s approach to protests in general and the publication of the Police, Crime, Sentencing and Courts Bill in March 2021.

164. The fact that there is a public interest in transparency or accountability in relation to the above issues, does not necessarily mean that there is public interest in the disclosure of this particular information. The appellant is at a disadvantage, because she has not seen the information. She can only speculate as to what public interests would be furthered by disclosure of this particular information.
165. The question of whether disclosure of the withheld information would further the public interests accepted by the tribunal depends, as Upper Tribunal Judge Jacobs recognised at paragraph 30 of *Ofqual v Information Commissioner* [2023] UKUT 253, on the nature and content of the information. That is the starting point.
166. Having reviewed the documents withheld under section 36(2)(b) we accept that they would have contributed to the general public interest in transparency and accountability to some extent in relation to the policing of protests generally, during the covid pandemic and in relation to this particular vigil, in relation to which the police had faced particular criticism.
167. In terms of the other specific points raised by the appellant set out above, the tribunal has read the information withheld under section 36(2)(b) and we find that the contribution to public debate from the withheld information being released in July 2021 would have been non-existent in relation to some of the matters raised by the appellant and very limited in others.
168. The withheld information does not illuminate any of the specific matters raised by the appellant to any significant extent. Any small references that there are to relevant matters in the withheld information do not, in any significant way, take the matters any further than the information that was already in the public domain in July 2021.
169. We note that in terms of transparency and accountability and questions of legality in relation to policing decisions taken before the vigil, the value which would be added by the publication in July 2021 of the requested information withheld under this exemption pales into insignificance compared to the information held by the Police that was subject to detailed scrutiny by the court in a future public judgment in *R (on the application of Leigh) v Commissioner of Police of the Metropolis*.
170. In accordance with *Ofqual v Information Commissioner* [2023] UKUT 253 we do not take account of that information (except to the extent that it overlaps with information that we refer to below as being already in the public domain at the time of the response). The information referred to in the judicial review that was not in the public domain at the time of the response, cannot be taken account of on the basis that it was ‘known... to be entering the public domain imminently’ (see para 35 of *Ofqual*).
171. However, it illustrates that there were, at the relevant time, other more effective means available for ensuring transparency and accountability of the actions of the Police, because the Police held a large quantity of more relevant information on the steps taken leading up to the vigil. As a matter of logic, although this was not the issue in the judicial review, the Police would also hold much more relevant information on the steps taken by the Police on the day and afterwards. This supports our view that the limited information held by the Home Office only assists to some extent in contributing to public debate and transparency/accountability on this issue.

172. The judicial review is, in our view, relevant in one other way. Although the decision was not handed down until 11 March 2022, the judicial review was already in progress in June 2021. We take account of the fact that it was known at the relevant time that this judicial review was specifically focussed on the decision-making processes and the legality of the police actions before the vigil, and the issues of the right to protest. There were therefore, in July 2021, already processes in motion which would be likely to contribute significantly to accountability and transparency in relation to the actions of the police, and to the public interest in understanding the extent to which human rights and the issue of measures to mitigate health risks formed or did not form part of the decision making process in a way which the withheld information, because of its nature and content, does not.
173. Further there was a significant amount of information already in the public domain at the time in the form of public statements and/or press releases from MPS and/or the Home Secretary.
174. In the light of all this, although there was a very clear public interest in transparency and accountability at the relevant time, the public interest in disclosure of this specific information was lower because of the specific content of the information and the limited light that it casts on the particular issues raised by the appellant, the other information already available in the public domain and in the light of the already in progress judicial review of the actions of the police prior to the vigil.
175. Looked at as whole, for the reasons set out above, we find that the public interest in maintaining the exemption outweighs the public interest in disclosure of this particular information.

#### ***Section 24***

176. This applies to two documents. We accept that exemption of the documents, even in a redacted form, is required for the purpose of safeguarding national security. We accept revealing even the existence of those particular documents or their format or nature presents risks to national security. The exemption is therefore engaged.
177. As the information which appears in the document related to the Sarah Everard Vigil is information that was in the public domain in any event, there is very little public interest in disclosing this part of the document, and no public interest in disclosing the rest of the document. For those reasons we find that the public interest balance falls in favour of maintaining the exemption and Home Office was entitled to rely on section 24 in relation to those documents.

#### ***Section 21 and section 40(2)***

178. The tribunal did not consider any documents withheld under sections 21 and 40(2) because these were not disputed by the appellant.

Signed Sophie Buckley

**OPEN ANNEX A**

179. This information is also provided in closed annex B in a table including the titles/descriptions of the documents.
180. The following documents in the closed bundle were withheld under section 21 FOIA. There is no appeal against the Commissioner's decision under section 21 and therefore the Tribunal did not read or consider these documents.

**RH3  
RH5  
RH6  
RH9  
RH10  
RH14  
RH17  
RH18  
RH19  
RH20  
RH21  
RH22  
RH34  
RH40  
RH41  
RH42  
RH43  
RH48  
RH50  
RH52  
RH53  
RH55**

181. Parts of the following documents were withheld under section 21. The tribunal did not read or consider the part of the document that was withheld under section 21:

**RH2  
RH16  
RH44  
RH49**

182. The following documents were withheld under section 24:

**RH23**  
**RH24**

183. The following documents were withheld under section 35(1)(a):

**RH31**  
**RH32**

184. The following documents were withheld under section 31(1)(a):

**RH12 (in part s 36(2)(b)(i))**  
**RH27**  
**RH28**  
**RH29**  
**RH[redacted]**

185. The following documents were withheld under section 36(2)(b)(i) or (ii) either in whole or in part:

**RH1**  
**RH2 (in part s 21)**  
**RH4**  
**RH7**  
**RH8**  
**RH11 (in part s 21)**  
**RH12 (in part s 31)**  
**RH13**  
**RH15**  
**RH16 (in part s 21)**  
**RH25**  
**RH26**  
**RH30**  
**RH33**  
**RH35**  
**RH36**  
**RH37**  
**RH38**  
**RH39**  
**RH44 (in part s 21)**  
**RH45**  
**RH46**  
**RH51**

186. The following document was withheld under section 40(2). The tribunal did not read or consider the document that was withheld under section 21:

**RH54**

