



Case Reference: EA/2023/0377; EA/2023/0038
Neutral Citation Number: [2024] UKFTT 00902 (GRC)

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

**Heard by Cloud Video Platform
Heard on: 29 April 2024 with subsequent written submissions
Decision given on: 15 October 2024**

Before

**JUDGE KENNEDY KC
JUDGE NEVILLE**

Between

Case Ref: EA/2023/0377

HIS MAJESTY'S TREASURY

Appellant

- and -

THE INFORMATION COMMISSIONER

First Respondent

- and -

ACCESS TO SOCIAL CARE

Second Respondent

CONSOLIDATED WITH

Case Ref: EA/2023/0378

MINISTRY OF HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

Appellant

- and -

THE INFORMATION COMMISSIONER

First Respondent

- and -

ACCESS TO SOCIAL CARE

Second Respondent

Representation:

For the Appellants: Laura Shepherd, of Counsel.

For the First Respondent: John Fitzsimons, of Counsel.

For the Second Respondent: Stephen Cragg KC.

Result: The appeals are allowed

Substituted Decision Notice: Within 35 days of being sent this decision, the respondents must disclose all the requested information that falls within the scope of the request, as specified in a separate closed annexe to this decision.

REASONS

Introduction:

1. This decision relates to two appeals brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") and heard together by the First-tier Tribunal. His Majesty's Treasury ("HMT") and the Department for Levelling Up, Housing and Communities ("DLUHC") appeal against the Information Commissioner's decision notices dated 25 July 2023, reference IC-185755-G3L6 ("DN1 -re: HMT) and reference IC-232828-R1B2 ("DN2" re: DLUHC).

Factual Background:

(1) HMT Appeal

2. Full details of the background to this appeal, the Second Respondent's request for information and the Commissioner's decision are set out in the relevant Decision Notice ("DN1") and not repeated here.

(2) DLUHC Appeal

3. Full details of the background to this appeal, the Second Respondent's request for information and the Commissioner's decision are set out in the relevant Decision Notice (DN2) and not repeated here.

Joint Chronology:

11 February 2022: Second Respondent submits a request to HMT seeking information relating to the department's discharge of its duty pursuant to s.149 of the Equality Act 2010 when determining the amount of government funding to be made available to local authorities for fulfilling their responsibilities under the Care Act 2014.

11 March 2022: HMT discloses some information but withholds the remainder, citing section 35(1)(a) FOIA as being exempt from disclosure.

14 April 2022: Second Respondent requests HMT internal review, challenging the decision to withhold information on the basis of section 35(1)(a) FOIA.

17 May 2022: HMT completes internal review and upholds refusal under section 35(1)(a) FOIA, save for one piece of information which was disclosed.

10 August 2022: Second Respondent complains to Commissioner regarding HMT's decision to withhold disclosure

26 September 2022: Second Respondent submits a request to DLUHC seeking information relating to the department's discharge of its duty pursuant to s.149 of the Equality Act 2010 when determining the amount of government funding to be made available to local authorities for fulfilling their responsibilities under the Care Act 2014.

27 October 2022: DLUHC responds withholding the requested information, citing section 35(1)(a) FOIA as being exempt from disclosure

22 December 2022: Second Respondent requests DLUHC internal review, challenging the decision to withhold information on the basis of section 35(1)(a) FOIA.

17 February 2023: DLUHC completes internal review and upholds refusal under section 35(1)(a) FOIA

15 May 2023: Second Respondent complains to Commissioner regarding DLUHC's decision to withhold disclosure

25 July 2023: Commissioner issued its decision in both FOI requests, concluding in both cases that exemption under section 35(1)(a) is engaged but that the balance of the public interest falls in favour of disclosing the disputed information.

22 August 2023: HMT and DLUHC appeal the Commissioner's decisions

10 November 2023: Commissioner files and serves response to appeals

13 November 2023: DLUHC files and serves witness statement of Lucy Pendrick

5 December 2023: Second Respondent files and serves response to appeals

29 April 2024: Case Management Directions directing:

- (1) HMT to provide any further evidence or written submissions restricted to the DFG Capital Evidence Document
- (2) HMT to provide an open witness statement verified by a statement of truth explaining how the DFG Capital Evidence Document came to be disclosed at such a late stage, the search methodology that was employed to meet the request for information and confirmation that no other potentially in-scope information exists.
- (3) The Commissioner and Second Respondent may, if advised, respond within 7 days of receipt.
- (4) HMT may then reply to any of those submissions within 7 days of receipt.
- (5) The Tribunal will thereafter make a decision on the appeals without a further hearing.

The Legal Framework:

4. Under s.1(1) FOIA, a person who has submitted a request for information to a public authority is, subject to the provisions of FOIA:
 - a. Entitled to be informed in writing whether it holds the information requested (s.1(1)(a)); and
 - b. If it does, to have that information communicated to them (s1(1)(b)).
5. The general duty to disclose information under s1(1)(b) will not arise where the information is itself exempted under provisions contained in Part II FOIA by virtue of s2. Section 35(1)(a) is one such exemption which may enable a public authority to refuse to provide the requested information.
6. Section 35(1)(a) provides that:

“(1) Information held by a government department or by the Welsh Government is exempt information if it relates to (a) the formulation or development of government policy...”
7. Section 35(1)(a) is a qualified exemption, which means that under s2(2)(b) FOIA, information within the scope of the exemption does not fall to be disclosed if *“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”* This means that if the requested information is exempt from disclosure, the Tribunal must weigh the public interest in maintaining the exemption against the public interest in disclosing that information.

Commissioner’s Decision Notice(s):

(1) HMT (DN1”

8. The Commissioner’s decision is that the withheld information is exempt from disclosure on the basis of section 35(1)(a) FOIA, but that the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

9. The Commissioner required HMT to provide Access to Social Care with a copy of the information which HMT withheld on the basis of section 35(1)(a) FOIA.

(2) DLUHC ("DN2")

10. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 35(1)(a) FOIA, but that the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

11. The Commissioner required DLUHC to provide Access to Social Care with a copy of the information which the Commissioner considers to fall within the scope of the request, namely:

- a. The parts of the Spending Review Guidance and accompanying technical annexes which concern the provision of equalities information to HMT; and
- b. Sheet 8 (i.e. the blank 'Equalities impact') from the unified template; and
- c. The completed version of Sheet 8 of the unified template.

Grounds of Appeal:

12. The Appellants submit that the appeal should succeed and that the figures within the completed Sheet 8 should be withheld, as should any information which does not relate to adult social care.

(1) HMT Appeal:

13. HMT relies upon six grounds of appeal:

- a. The Commissioner erred in law in finding a presumption in favour of disclosure applied.
- b. The Commissioner, having concluded that policymaking was still ongoing and live at the time of the request, wrongly concluded that the public interest in disclosure outweighed the public interest in maintaining the exemption under section 35 FOIA.

- c. The Commissioner failed to consider whether the information already provided by HMT satisfied the request.
- d. The Commissioner failed to properly take into account the fact that the Public Sector Equality Duty (“PSED”) is a procedural duty when considering whether disclosure of the Sheet 8 was necessary to satisfy the request;
- e. The Commissioner failed to properly set out what documents (or parts of documents) were within the scope of the Request, and in particular, failed to consider whether the profile of spend was in the scope of the request; and
- f. The Commissioner failed to properly consider whether part-disclosure or redaction of the completed Sheet 8 would satisfy the request (§3 GoA)

(2) DLUHC Appeal

14. DLUHC relies upon four grounds of appeal:

- a. The Commissioner erred in law in finding a presumption in favour of disclosure applied.
- b. The Commissioner, having concluded that policymaking was still ongoing and live at the time of the Request, wrongly concluded that the public interest in disclosure outweighed the public interest in maintaining the exemption under section 35(1)(a) FOIA.
- c. The Commissioner failed to properly take into account the fact that the Public Sector Equality Duty (“PSED”) is a procedural duty when considering whether disclosure of the Sheet 8 was necessary to satisfy the Request; and

- d. The Commissioner failed to properly consider whether part-disclosure or redaction of the completed Sheet 8 would satisfy the Request (§3 GoA)

Commissioner's Response:

15.In brief, the Commissioner recognises and accepts that there is no presumption in favour of disclosure when an exemption is engaged. However, in the circumstances of these cases, and accepting that the matter is finely balanced, the Commissioner's position is that the public interest in disclosure outweighs the public interest in withholding the HMT and DULHC disputed information. The Commissioner does not agree that he erred in balancing the relevant public interest considerations in these appeals and invites the Tribunal to dismiss them.

Applicability of section 35(1)(a) FOIA:

16.The Appellants and the Commissioner agree that section 35(1)(a) is engaged. The Commissioner set out his reasons for this in the Decision Notices. In light of the agreed position those reasons are not repeated here.

17.At the time of the Commissioner's submissions on the appeals, the Second Respondent continued to dispute whether section 35(1)(a) FOIA is engaged and was to make further submissions on this in the closed hearing if required. The Commissioner had also not yet seen the unredacted version of the DFG Capital Evidence document disclosed by HMT on 16 April 2024 and as such could not at that stage agree that s35(1)(a) or any other exemption was engaged in respect of that document.

Presumption in favour of disclosure:

18.The Commissioner now accepts that, in light of the *dicta* in *Department of Health v Information Commissioner and Lewis* [2017] EWCA Civ 374 at [46], there is no presumption in favour of disclosure of information when a qualified exemption is engaged. To the extent that the HMT DN or DLUHC DN suggest otherwise, the Commissioner agrees this is not the correct approach as a matter of law.

Public Interest Balance:

- 19.**The Commissioner’s position remains that the public interest balance remains finely balanced, but that ultimately the public interest arguments in favour of disclosure outweigh those in favour of maintaining the exemption. The Commissioner is satisfied that despite the finely balanced factors on both sides, he has struck the balance appropriately in concluding that the disputed information should be disclosed.
- 20.**The factors set out by the Appellants in their grounds of appeal are factors that were taken into account by the Commissioner in the HMT DN1 (in particular at §§65– 69) and in the DLUHC DN2 (in particular at §§67-72). The Appellants argue that these factors merited greater weight than the Commissioner gave them. The Commissioner notes that he afforded “significant weight” to safe space arguments (§65 HMT DN1, §67 DLUHC DN2), and accepted that the encroachments upon the safe space that ministers and officials need for ongoing policy making as a result of the disclosure of the disputed information deserved “considerable weight” (§66 HMT DN1, §68 DLUHC DN2).
- 21.**The Commissioner also dealt with questions of the chilling effect and reached conclusions as to this in the HMT DN1 §§67-69 and the DLUHC DN2 §§69-72. The Commissioner also had regard to the witness evidence of William Davis at §§38-39. It is important the Commissioner noted to remember that the Upper Tribunal explained in *Davies v Cabinet Office* [2019] UKUT 185 (AAC) at [25] that “...there is a substantial body of case law which establishes that assertions of ‘chilling effect’ on provision of advice, exchange of views or effective conduct of public affairs are to be treated with some caution”.
- 22.**HMT provided a witness statement from William Davis, Deputy Director, Local Government and Reform, Public Services Group at HMT. Much of Mr Davis’ evidence around chilling effect suggests that the legitimate internal negotiations between government departments and HMT may be undermined by disclosure of the HMT disputed information. The Commissioner does not deny that there may be some impact on how those negotiations are conducted should such information be disclosed. However, the Commissioner struggles to see how disclosing what it is a department seeks as an opening proposition

in a spending review which will then be challenged by HMT and subject to negotiation can properly undermine the ability to conduct such negotiations.

23.In *Davies* [25]-[26], the UT approved *dicta* from *Department for Education and Skills v IC and Evening Standard (2007) IT* that “*in judging the likely consequence 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.*” The Commissioner considers that, on balance, civil servants and Ministers should still be able to set budgets as they deem appropriate based on best available evidence despite spending submissions from government departments that enter the public domain.

24.Many of the arguments of Mr Davis relate to the need for internal candour between officials in the course of internal negotiations. The Commissioner does not wish to downplay the importance of this but also recalls that the Upper Tribunal in *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC) in upholding the Commissioner’s decision to disclose the Ministerial Diary of the Secretary of State for Health, highlighted what it called the ‘weakness’ in arguments for non-disclosure based on the need for candour:

“The lack of a right guaranteeing non-disclosure of information, absent consent, 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 of 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 if he is properly informed, 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.”

25.In these cases, the Commissioner notes in particular, that the impact on both the safe space and chilling effect issues is arguably lessened by the fact that the live policy making at the time of the requests only concerned the reprioritisation of the 2023/2024 budgets rather than live policy making in relation to the 2020 spending review itself. This means that disclosure at the point of the requests would not have interfered with the policy making process for which the information was initially submitted.

26.The Commissioner also disagrees with the suggestion by the Appellants that disclosure has the potential to undermine the principle of collective responsibility. There is nothing that the Commissioner can identify in the contents of the disputed information that he considers would undermine collective responsibility.

27.Further, the Commissioner does not understand the Appellants to be relying on s35(1)(b) FOIA which is the exemption relating to ministerial communications and collective responsibility; nor does the Commissioner understand the HMT or DLUHC disputed information to be a “ministerial communication” within the meaning of that section in any event.

28.Finally, the Commissioner also has concerns that the version of the DHSC Sheet 8 that HMT has disclosed has a significantly greater number of redactions than the DLUHC Sheet 8 disclosed by DLUHC (where the redactions are minimal and relate to figures). At the time of the Commissioner’s submissions on the appeals, the Appellants had not explained the reasoning behind this discrepancy:

Important factors to weigh in the public interest balance:

29.As for the public interest arguments in favour of disclosure, the Commissioner remains satisfied that the following factors are important to weigh in the balance.

30.First, the allocation of local government spending and adult social care spending is an area of significant public interest, including the basis upon which equalities impacts have been factored into decision-making. Disclosure would provide a direct insight into how government departments take into account the impact of their spending on protected groups and provide direct insight into the information being considered by ministers and officials in relation to the decisions about reprioritisation of 2023/2024 budgets. This factor merits particular and significant weight (§70 HMT DN and §73 DLUHC DN).

- 31.**Second, the Commissioner broadly agrees with ASC that while there is some information in the public domain concerning meeting the public interest in transparency and accountability, it does not provide anywhere near the level of insight that disclosure of the disputed information would. The disputed information would add significantly to transparency and accountability around this issue, beyond that already achieved by information in the public domain (§71 HMT DN and §74 DLUHC DN). The Commissioner finds the evidence of Ms Gerstheimer on this issue to be persuasive.
- 32.**Third, disclosure of the information could allow the social care sector and those with care and support needs, to meaningfully respond to current equalities information and suggest representations for its improvement. Such a process could potentially improve the quality of decision-making. The Commissioner finds Ms Gerstheimer’s evidence on this issue particularly at §§40-41 of her statement to be persuasive.

Public Sector Equality Duty as a procedural duty:

- 33.**The Commissioner also noted that the public sector equality duty (“**PSED**”) under s149 Equality Act 2010 is a procedural duty and that discharge of the requirements of the PSED does not require a particular outcome. Its scope was encapsulated by the Court of Appeal in *R(Bridges) v Chief Constable of South Wales Police* [2020] 1 WLR 5037 at [181]:

“We acknowledge that what is required by the PSED is dependent on the context and does not require the impossible. It requires the taking of reasonable steps to make enquiries about what may not yet be known to a public authority about the potential impact of a proposed decision or policy on people with the relevant characteristics, in particular for present purposes race and sex.”

- 34.**The Court of Appeal also endorsed at [175] McCombe LJ’s summary of the principles that emerge from the earlier caselaw in *R(Bracking) v Secretary of State for Work and Pensions* [2014] EqLR 60, in particular for present purposes, the principle that *“provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting*

them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision.”

- 35.** The Commissioner considered the HMT and DLUHC disputed information in detail. It is clear from a close reading of it that the various columns on profile of spend inform and inter-relate with the other columns in the document. Together, all the columns comprise the overall picture of the Equalities Assessment. The columns concerning profile of spend are necessarily linked to other columns such as equalities impact because it is only through understanding the nature of the profile of spend that one can properly capture what its equalities impact will be. The Commissioner therefore considers that the information goes hand in hand as portraying the overall equalities information picture.
- 36.** Further, while the PSED is a procedural requirement, it is clear from the caselaw set out above that the duty relates to making enquiries about the potential impact of a proposed decision or policy on people with relevant protected characteristics. In this case, the discharge of the PSED involved making such enquiries about the impacts associated with the proposed profile of spend. The information in respect of both the spend and the impacts therefore do relate to the procedural question of whether the PSED is properly discharged.
- 37.** Finally, the Appellants seek to underplay the weight to be given to factors in favour of disclosure by arguing that the information contained within the HMT and DLUHC disputed information contains spending figures that do not reflect the full amount of money requested by all government departments. Mr Davis makes similar points in his evidence and Ms Pedrick’s evidence focuses on this issue at §§18 onwards.
- 38.** However, the Commissioner is wary of accepting arguments relating to harm caused by taking information out of context. This is because it is often possible to rectify this simply by putting the information into its appropriate context in some way. The Commissioner’s view is that there is nothing preventing the Appellants from properly explaining the context of the information if it is indeed the case that the spending figures do not reflect the full amount of money spent. However, Ms Pedrick observes that once released, DLUHC’s view

is that it loses control of the information and cannot prevent it from being disseminated without the accompanying contextual information.

39. While the Commissioner can see that it may be difficult to provide context after the fact, the Commissioner does not envisage particular difficulties in the information being contextualised at the time it is disclosed such that the released information and anything contextualising it may be read together. The Commissioner can also see that there may be some transparency and accountability value to understanding what sums are being considered and proposed by departments at initial stages of the spending review process when then compared to what the final numbers are. This may assist public understanding in knowing at what point in the budget setting process certain decisions are made.

Scope in the HMT Appeal and Redactions:

40. As is clear from the factual background set out above, HMT provided a lengthy representation and a copy of the disputed information to the Commissioner during the course of the Commissioner's investigation. HMT did not argue anywhere in that letter, as it sought to do at appeal, that part of the information provided falls outside the scope of the HMT request:

41. While the Commissioner accepts that the Tribunal will conduct a full merits review and HMT is entitled to raise new points (see *Information Commissioner v Malnick* [2018] UKUT 72 (AAC)), it is equally important that the Tribunal bears this context in mind. If HMT had any concerns about the Commissioner's approach to the scope of the HMT Request, it had every opportunity to raise them. It was certainly not obliged to provide any information to the Commissioner that it did not consider fell within scope.

42. The context and content of the HMT DN clearly indicate that the Commissioner considered that the information provided by HMT fell in its entirety within scope. This is clear from the fact that:

- a. At no point does the Commissioner indicate that the information provided to him by HMT should be disaggregated because some of it is not within scope; and

- b. The analysis by the Commissioner repeatedly refers to how it considers the withheld information involves “budgeting decisions on equality issues”.

43. Finally, to the extent that HMT and DLUHC argue that the figures do not fall within the scope of the request and partial disclosure can satisfy the requirements of the DNs, the Commissioner repeats the points he makes in respect of the PSED analysis above. The profile of spend appears to be necessarily intertwined with the rest of the Sheet 8 information.

Second Respondent’s Response:

44. The Second Respondent submits that the decision of the Commissioner that all the information requested must be disclosed should be upheld.

Application of the exemption:

45. Section 35(1)(a) of FOIA states that:-

- (1) Information held by a government department... is exempt information if it relates to –
 - (a) the formulation or development of government policy,

46. Section 35(2) FOIA specifically deals with statistical information and states that:-

- (2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded –
 - (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy.

47. Section 35(4) FOIA directs a particular emphasis on the public interest in the disclosure of factual information which has been used in decision taking when it states that:-

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

48.In relation to the withheld information the request the Commissioner accepted *"...that it is plausible to argue that the withheld information...relates to the formulation and development of policy making regarding the 2023/24 financial year....[and] is exempt on the basis of section 35(1)(a) because i) it relates to policy making in relation to the 2020 spending review and ii) it relates to policy making in relation to the budget setting for later years, including 2023/24."* (paragraphs 36 and 38 of the decision notice).

49.This was on the basis, set out in paragraphs 22 and 23 of the relevant DN, that:-

22...HMT explained that the information in scope sets out the impact of both current spending and funding proposals in relation to various areas of healthcare spending on different protected groups for the period 2021/22 to 2023/24.

23...HMT acknowledged that the spending review 2020 was published on 25 November 2020. However, it argued that policy development in this area continued after the publication of the spending review 2020 in several forms. As noted above, even though the information in scope was collected for the period 2021/22 to 2023/24, HMT decided at the time only to set budgets for the financial year 2021/22. Since then, as noted above, DHSC budgets were set for 2023/2024, but these budgets have undergone several reprioritisation processes in the time since and are currently undergoing another process of reprioritisation.

50.At the time of ASC's Response, it had not seen the withheld material and was unable to make any submissions on this issue.

51.In relation to the applicability of s35(2) FOIA. The Commissioner decided that (paragraph 37):-

37...With regard to the applicability of section 35(2), there is limited numerical data contained within the withheld information. In terms of the information that is

expressed numerically, having considered such information and its context, the Commissioner favours HMT's position that this amounts to views or opinions expressed numerically rather being statistical information.

52. At the time of ASC's Response, it had not seen the material in question and did not make submissions on this issue. ASC did note that, given nature of the request, it seemed very likely that at least some of the information sought was covered by s35(2) FOIA.

Public Interest Balance:

53. ASC agrees with the Commissioner's Response (paragraphs 25-36) that, if the section 35(1) FOIA exemption applies to the withheld material, then the public interest favours disclosure. In brief, ASC's position is that the public interest factors in favour of disclosure outweigh those put forward by the Appellant in favour of non-disclosure.

54. The Commissioner has set out ASC's main reasons for arguing that the public interest is in favour of disclosure and the arguments are set out also in ASC's letter of complaint to the Commissioner dated 10 August 2022 (included in the supplementary bundle). ASC stands by the submissions there described and has produced witness evidence in the DLUHC case upon which it will rely.

55. ASC's position is that the public interest reasons in favour of disclosure are those of transparency and accountability in budgetary decision making, which are particularly important where the decision-making process concerns allocation of significant sums of money with the potential for significant impacts on groups of vulnerable people, at a time when there was growing concern about the adequacy of funding for social care. ASC highlighted that disclosure of the withheld information would contribute to better fiscal outcomes and more responsive impactful and equitable policies. Disclosure would enable the social care sector, and those with care and support needs, to respond meaningfully to the robustness and suitability of current equalities information, and to make representations for improvement.

56. ASC also questions whether the information does in fact relate to the formulation and development of policy making regarding the 2023/24 financial

year. ASC submits that the Commissioner's conclusion on this issue at paragraph 36 of the decision notice that it is 'plausible to argue' that it does is a cautious one. ASC submits that this is an important issue for the Tribunal which could lessen the strength of the public interest in favour of non-disclosure, if the Commissioner's conclusion is not correct.

Information already disclosed did not satisfy the request:

57.ASC agrees with the Commissioner (paragraph 37 of the Response) that the decision notice did consider that some information had been disclosed already. ASC agrees that, on the basis of what is known about the withheld material, those disclosures did not satisfy ASC's request, and notes and agrees with the Commissioner's points that the Appellant provided the Commissioner with information accepted to be within scope during the Commissioner's investigation. Likewise, ASC agrees with the Commissioner's analysis at paragraphs 43-45 that the decision notice properly defines the scope of the request in line with the submissions then made by the Appellant to the Commissioner and the information provided to the Commissioner as the withheld material in this case.

Public Sector Equality Duty:

58.The Appellant's case is that 'the profile of spend figures represents the outcome and not the process' of the PSED duty, and so the Commissioner has 'ordered information to be provided which goes further than what is required to establish that the department has complied with PSED' (paragraph 45 of the Grounds). ASC note the Commissioner's analysis of this argument in paragraphs 41-42 of the Commissioner's response. ASC note the Commissioner's conclusion that 'columns concerning profile of spend are necessarily linked to the other columns such as equalities impact because it is only through understanding the nature of the profile of spend that one can properly capture what its equalities impact will be'.

59.ASC supports the logic of the Commissioner's submissions about the linkage between the spend profile columns and other columns for the purposes of capturing the equalities impact. In this context ASC confirms that in its view the spend profile figures are core to its requests for the purposes of

understanding the discharge of responsibilities under section 149 of the Equality Act 2010. It is ASC's position that the Appellant appears to be making a highly legalistic approach to avoid disclosure of some of the important information sought.

60. ASC submit that the request should be seen in the context of s35(4) FOIA and that regard should therefore be had to 'the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking', which in this case means the totality of the decision-taking which relates to the discharge of the PSED by the Appellant.

61. ASC wants to know what information the Appellant has taken into account when considering the PSED. This is not for the purpose of analysing whether the Appellant has simply complied with the procedural duty. Rather it is for the main purpose of finding out what factors and issues are taken into account by the Appellant for the purposes of considering the PSED and assessing the outcomes, so as to better understand what information is garnered and considered by decision-makers.

Appellant' Reply to the Second Respondent's Response:

62. In brief, the Appellants submitted that the Commissioner's decision was wrong and that the request could be satisfied by part-disclosure of Sheet 8.

63. Since the Appeal has been lodged in this case, both HMT and DLUHC have reconsidered the Second Respondent's request and whether there is any additional information which can be disclosed. At the time of the Appellants' reply to the Second Respondent's response, the Appellants had disclosed all documents save for the completed version of Sheet 8 of the unified template. The departments further considered whether there was information within Sheet 8 which could be disclosed and determined that Sheet 8 is disclosable in part. A redacted version of Sheet 8 was to be disclosed which includes all of the information save for the figures which represent the bids made to HMT, also known as the "profile of spend". In DLUHC's case, DLUHC submits a bid for the entire amount of funding they consider local government requires, which

builds off numbers provided by other departments. The Appellants therefore submit that the only argument now concerns whether the profile of spend in Sheet 8 should be disclosed.

Submission 1: Chilling Effect:

64.For the reasons set out in the witness evidence, it is the Appellants' position that disclosure of the figures would have a chilling effect on the development of government policy. The process by which departments have spending allocated to them in the spending review is by making bids. It is the Appellants' position that, if these figures were disclosable, this would clearly have a chilling effect. The Appellants submit that submitting Sheet 8 is part of a negotiation process which takes place confidentially, whereas if it were open to public scrutiny that would inevitably alter the way the departments negotiate with HMT. It is the Appellants' position that the safe space of policy development would be significantly hampered were the presumption to be that the figures are disclosable.

Submission 2: Disclosure Would not Improve Public Debate:

65.The Appellants' position is that disclosing the figures would not increase government accountability, improve public debate, or result in any other significant public benefit. They submit that the figures do not reflect the full amount of money requested by all government departments, nor does it reflect the allocations which are ultimately made as a result of the spending review process. They submit that, due to the particular financial circumstances of the UK since the completion of the 2020 Spending Review, the figures have been supplanted by the Spending Review 2021.

66.The Appellants' submit that the potential for the figures within Sheet 8 to improve public debate or increase accountability is limited. Their position is that the chilling effect and the potential to undermine the principle of collective responsibility significantly outweigh considerations of transparency, accountability, and public interest in this case.

Submission 3: The Figures Within Sheet 8 are out of Scope:

67.As set out within the HMT Grounds of Appeal, the Appellants submit that the Commissioner failed to properly define which information was within scope. It is submitted that the figures themselves are outside of the scope of part (b) of

the original request; “copies of Equalities Information provided by the Department of Health and Social Care in full to the Treasury in relation to the 2020 spending review”. The figures do nothing to further either the requestor or the public’s understanding of the Equalities Information provided to HMT. They submit that, as set out in their witness evidence, these are merely the figures sought by DHSC, not the ultimate amount allocated by HMT, nor the total amount requested by all departments. Their position is that knowledge of the specific bids made by departments is clearly not required to understand the equalities information provided in the rest of Sheet 8, which will now be disclosed.

Submission 4: PSED is a Procedural Duty:

68.As set out within the Grounds of Appeal, PSED is a procedural duty. The Appellants submit that it does not require any particular outcome; it only requires the department to “have regard” to the matters set out in s.149 Equality Act 2010. The Appellants position is that, in requiring DLUHC to provide the completed spreadsheet, which includes the figures, the Commissioner has ordered information to be provided which goes further than what is required to establish that the department has complied with PSED. It is submitted that this was not fully taken into account or explored within the decision when considering whether Sheet 8 should be disclosed. As a result, it is submitted that the decision is fundamentally flawed.

69.The Appellants further submit that disclosure has the potential to undermine the principle of collective responsibility, which was highlighted in the case of *Sloan* at [35]-[42] as a convention of constitutional importance. They submit that removal of part of the foundation upon which the doctrine of collective responsibility rests will weaken its integrity and undermine it.

Submission 5: Sheet 8 is Disclosable in Part:

70.The Appellants submit that it is possible for there to be part-disclosure of a document where some parts of the document fall within the exemption, and others fall outside of it (or, alternatively, where the public interest balance lies in part-disclosure of a redacted document, see: *Busby v ICO* [2023] UKFTT 305 (GRC)). They submit that the requestor did not request information as to the amount of the bid submitted to HMT, but the equalities information submitted. It is submitted that the figures within Sheet 8 are clearly out of scope and do

not come within the remit of that which was requested in the initial request. The Appellants' position is that it is possible to satisfy the initial request by redacting the profile of spend and that the Commissioner failed to consider this question of partial disclosure or redaction of Sheet 8. They submit that the remainder of Sheet 8 (excluding the figures) relates to the equality impact information and that this is both within scope (where the figures not) and also satisfies the original request.

Second Respondent's Post Hearing Submissions:

- 71.**The Second Respondent made these further submissions pursuant to the directions made by the Tribunal at the hearing on 29 April 2024, when it became clear that an incomplete document (the DFG Capital Evidence Document) had been disclosed by HMT in OPEN and CLOSED.
- 72.**The Tribunal also required HMT to confirm whether any other documents were held in scope of ASC's request. Two other documents have been identified (a) the 'Technology Capital Document'; and (b) the 'Resource DEL Spending Template Document'.
- 73.**HMT has submitted a further 17 page witness statement there are 11 more pages of submissions, and 93 pages more documentation. Much of the documentation is redacted (said to be not in scope) or to which it is claimed s35(1)(a) FOIA applies. There are long redacted passages in the submissions and the witness statement. In addition to the present submissions, the Second Respondent relies on the Commissioner and the Tribunal to analyse these redacted documents and passages, and consider the arguments raised by HMT which cannot be addressed by ASC.

The scope of the Requests:

- 74.**The Second Respondent is concerned that HMT continues to pursue arguments which seek to artificially limit the scope of the Second Respondent's requests in this case. In relation to the DFG Capital Evidence Document these arguments are set out at paragraphs 13 to 14 of the new witness statement; in relation to the Technology Capital Document at paragraph 26 of the witness statement; and in relation to the Resource DEL ASC Spending Template Document at paragraph 33 of the witness statement.

75.In arguing that large parts of the document are out of scope, the HMT witness statement says (paragraph 14(a)):

The request was limited to information collected for “the purpose of the discharge of the s149 duty”. The limitation of this request acknowledges that it is possible to consider and interpret information collected for this purpose without all information on the detail of spending proposals submitted by Departments i.e. without information collected for other purposes.

76.HMT recognises that an argument could be mounted that the remainder of the documents are ‘nonetheless necessary to contextualise the information’ (HMT witness statement paragraph 14) which would bring the information within scope.

77.It is also to be noted that the witness statement refers to the documents ‘touching in various places on issues relevant to equalities’ (see paragraphs 13 and 33) but seeks to exclude this information from scope on the basis that there is no specific reference to s149 of the Equality Act 2010 and the PSED.

78.The Second Respondent submits that, to an extent, it will have to rely on the Tribunal and the Commissioner to consider whether any or all of the information redacted as ‘out of scope’ is in fact within scope either directly or because of the need to contextualise the information which HMT itself considers is within scope.

79.In relation to the information said to be ‘touching’ on and ‘relevant to’ equalities but not in scope, the Second Respondent submits that it is difficult to see how something could be ‘relevant to equalities’ yet not specifically relevant to the discharge of the s149 duty. The Second Respondent’s position is that this formula suggests an incorrect approach to the scope of the request. It is submitted that if information is relevant to equalities it would fall to be considered as within scope even if it is not contained in a column or part of a document asking about ‘*equalities impact*’.

80.In relation to HMT’s arguments regarding scope, the Second Respondent asks the Tribunal to consider the whole of the text of its request. The Second Respondent defined Equalities Information in the request as “*the information*

gathered, provided or considered for the purpose of the discharge of the section 149 duty". The Second Respondent submits that, in order to understand the true scope of that information, it is necessary to be clear about the relevant function being exercised in respect of which the section 149 duty is being discharged.

81.The request was made in respect of the discharge of the s149 duty *"in connection with the determination of central government funding allocations to local social services authorities ..."* and also that it was to include *"the determination of funding available to such authorities to use in fulfilling their responsibilities under the Care Act 2014"*.

82.In the view of the Second Respondent, the information that is relevant and falls to be considered in the discharge of the duty includes:

- (a) the funding bid and its proposed use;
- (b) how it relates to the statutory equalities' objectives;
- (c) who will benefit, when and to what extent; and
- (d) the likely effectiveness of the project.

83.With specific reference to the DFG Capital Evidence Document, HMT's witness statement explains that it is a document based on the Capital Evidence Note Template. Paragraph 9 of that statement explains this template uses the following headings:

- a.Proposal details
- b.Strategic Case
- c.Economic analysis including how the proposal affects people sharing any of the protected characteristics
- d.Financial costs
- e.Commercial and delivery plan
- f.Delivery risk potential assessment

84.In relation to each of these, in the Second Respondent's view the following information would be relevant to the discharge of the section 149 PSED duty:

- a. The proposal for the use of the funding requested would include not only the outline (which here is the funding for the statutory DFG

scheme) but the details, for example, whether the intention is to fund only mandatory grants or some discretionary and, if so, which.

- b. Part of the strategic case would be an explanation of whether and to what extent the project will contribute to each of the statutory equalities' objectives.
- c. The explanation of how the proposal affects people sharing protected characteristics would include the numbers of disabled and older beneficiaries eligible for mandatory grants and those intended to benefit from any discretionary grant funding to be made available and the nature of the benefit.
- d. The SR year cost would depend on (a) assumptions made about average grant size taking account of the approach to the reasonableness and necessity tests in the legislative scheme and the impact of the latter on grant size; (b) expected waiting times from application to delivery; (c) inflation; (d) geographical variation in build costs; and (e) whether there is a proactive plan to tackle take-up rates, etc.
- e. Plan for effective delivery would include information about proactive take-up campaigns including publicity.
- f. Challenges for effective delivery would include historical take-up rates and geographical/ equalities profile of the latter; availability of Occupational Therapists to undertake assessments etc.

85.In relation to the Technology Capital Document it is said by HMT that this follows the same template with the same section headings, but almost everything has been redacted largely on the basis of the above arguments for saying it is out of scope, with only a few areas conceded to be in scope but redacted on section 35(1) FOIA grounds. Given the nature of the headings used it is submitted that the same arguments raised above in relation to the DFG document could be made for the whole of this document being within scope.

86.It is also noted that there is reference to both the Resource DEL ASC Spending Template Document and the Resource DEL ASC Spending Template Document additional tabs. These appear in the supplementary open bundle as two separate documents, but the witness statement only discusses the first. The whole of the 'additional tabs' document is redacted as being out of scope but there is no evidence which addresses the reasons for this, at least in OPEN.

87.It is said that the Resource DEL ASC Spending Template Document deals with day- to-day funding in relation to four relevant projects, one of which is the DFG project. It is structured differently to the capital evidence templates with a section to outline what is to be delivered and then a column for 'equality impacts' (see paragraph 29). However, the Second Respondent asks the Commissioner and the Tribunal to consider both the issue of interpretation of scope and the issue of contextualisation in relation to this document.

Section 35(1) FOIA

88.HMT makes the same arguments in relation to these documents in terms of s35(1) FOIA as it did in relation to the information considered during the appeal hearing. The Second Respondent relies on the submissions already made on this issue and asks the Commissioner and the Tribunal to consider this newly withheld information in the light of those submissions.

89.The Second Respondent also notes that in the DFG Document the subsection (numbered 7) of the economic analysis section asks for information as to how the proposal affects people who share protected characteristics. The material immediately following the brief description of DFGs in that section has been excluded on s35(1) FOIA grounds even though in the Sheet 8 as currently disclosed HMT has provided all the 'impact section' information apart from the spend figures. The Second Respondent highlights that this is not the case for this document and HMT have offered no real explanation, at least in OPEN, for the difference in approach.

Further documents:

90.At the end of the witness statement (paragraph 55), HMT accepts that there may be other documents 'potentially in scope' if the Tribunal does not accept HMT's restrictive interpretation of the scope of the request. In the first place, it is submitted that it will be difficult for the Tribunal and the Commissioner to take a view on whether or not these documents are within scope or not without having sight of them. This is especially the case as HMT states that:
"...it is likely that further documents "principally those containing equalities information that do not relate to adult social funding) would be within the scope of the original request" and "...over 50 documents were originally provided at SR20 by

DHSC, mostly relating to non-adult-social- care parts of the Departments ambit". (Emphasis added.)

91. The Second Respondent's request is focused on funding to local social services authorities, but is troubled by HMT's use of the words 'principally' and 'mostly' in the statement which suggests that it does indeed hold at least some further information which may be in scope of the request, and the Tribunal is asked to seek clarification of this issue.

Appellants' Reply to Post Hearing Submissions:

92. At paragraphs 7-16 of the Second Respondent's submissions, the Second Respondent appears to dispute HMT's definition of "equalities information". The Appellants submit that the Second Respondent themselves have defined what is meant by "equalities information" (p.65 of HMT's open bundle):

"In our requests we refer to the information gathered, provided and/or considered for the purpose of the discharge of the s149 duty in connection with this determination in the relevant spending reviews as 'Equalities Information' --"

93. In applying this definition, the Tribunal must consider the purpose for which the information was gathered, provided and/or considered. The Appellants submit that the information which HMT has redacted for being out of scope was collected by HMT for the purpose of conducting the Spending Review, not for the purpose of fulfilling the PSED. The information collected for the purpose of fulfilling the PSED is explicitly defined within those documents. They argue that, applying the Second Respondent's own definition, it is the purpose of gathering, providing and/or considering which must be considered when determining whether or not information is within scope. It is the Appellants' position that HMT's evidence is clear as to which parts of the documents were gathered, provided and/or considered for the purposes of discharging the PSED.

- 94.**The Appellants submit that, were the Tribunal to accept the Second Respondent's new definition of "equalities information", this would mean that any information held about any people with protected characteristics, regardless of the purpose for which that information was collected, is "equalities information". They submit that (i) the Second Respondent's own definition of "equalities information" relates to the discharge of PSED and (ii) were the definition of "equalities information" to be this wide, it would make the PSED unwieldy and unenforceable.
- 95.**At paragraph 15 of the Second Respondent's submissions, further detail is requested as to the "additional tabs" from the SAC Spending Template Document. These two additional tabs form part of the wider Resource DEL ASC Spending Template Document and relate to guidance to support officials when completing it. This covers definitions and an illustrative example. The Appellants submit that it is therefore out of scope as it does not provide information relevant to the second respondent's initial Freedom of Information request.
- 96.**Further, as to the Second Respondent's submissions regarding contextualisation, it is submitted that only such additional information as is required in order to ensure that the information within scope is capable of being understood. HMT reiterates the offer to provide a contextualising letter if this assists. It is submitted that the Tribunal should not take a broad approach to documents, but properly consider which part of the documents are within scope. In *Busby v ICO* [2023] UKFTT 305 (GRC), at [50] that:
[...] the Decision Notice erred in law by taking an impermissibly broad approach to the information contained in the report. We find that it considered the engagement of s.35(1)(a) to the report as a whole, without considering whether the report contained information which fell outside the scope of that exemption and which could have been disclosed.
- 97.**It is submitted that this is equally applicable to the issue of scope. The Appellants submit that the Tribunal should consider, not the document as a whole, but whether there is information within the document which is out of scope. If the document is capable of being redacted while still capable of being understood, it is submitted there is no need for further disclosure. Further, any

deficits in the how comprehensible the disclosable parts of the document are can be remedied by providing context, rather than out-of-scope information, or information to which the exemption applies and where the public interest weighs in favour of withholding disclosure.

98. At paragraph 21 of the Second Respondent's submissions, it is said that the Second Respondent is troubled by HMT's use of the words "principally" and 'mostly'. The Second Respondent goes on to suggest that this means that it does hold further information which may be within the scope of the request. The Appellants submit that, as set out within the joint witness statement of Mr Davis and Mr Montanari, these other documents only come within the scope of the request if the Tribunal does not agree with HMT's submission, namely that the scope of the request is limited to information gathered, provided and/or considered for the purpose of the discharge of the s.149 duty, and information which relates to determining central government funding allocations to local social services authorities. The Appellants submit that HMT has applied its definition of the scope to those additional documents and can confirm that no further documents come within scope.

99. Based on HMT's searches, only 4 of the 50 documents concern both:

Information gathered, provided and/or considered for the purpose of the discharge of the PSED duty (page 65 of HMT's Open Bundle); and
Information which is in connection with determining central government funding allocations to local social services authorities (page 65 of HMT's Open Bundle).

100. The Appellants submit that 4 out of 50 documents which have been identified as within scope are those which have been disclosed already.

The Closed Hearing:

101. In the closed session, the Tribunal received a copy of the unredacted DFG Capital Evidence Document. It reviewed this document along with the withheld information in the two closed bundles. The Tribunal considered the redacted figures in both Sheet 8 Equalities Assessments documents and considered

whether those figures fell within the scope of the requests and if so, whether there was a public interest in disclosing them with the rest of the Sheet 8 Equalities Assessments.

102. The Tribunal also considered the further redactions in the HMT Sheet 8 Equalities Assessment and heard arguments from the Commissioner and the Appellants about whether the material redacted in that document fell within the scope of the Second Respondent's request. The Tribunal considered the other background documents in the HMT Closed Bundle which were exhibited to the witness statement of William Davis.

103. Finally, the Tribunal, with the assistance of counsel from the Appellants and the Commissioner, considered the questions/issues advanced by the Second Respondent in open session, in particular:

- How the Second Respondent can take part in a dialogue on adult social care and equalities matters without having sight of the profile of spend in the Sheet 8 documents
- The extent to which the s35(1)(a) exemption applies to the remaining redactions bearing in mind the Commissioner had accepted that it is: "plausible to argue that the withheld information...relates to the formulation and development of policy making regarding the 2023/2024 financial year... and is exempt on the basis of section 35(1)(a) because (i) it relates to policy making in relation to the 2020 spending review and (ii) it relates to policy making in relation to the budget setting for later years, including 2023/24." - Whether s35(2) FOIA concerning statistical information is applicable to any of the withheld information.
- Whether s35(4) FOIA is relevant to the withheld information.
- Whether the redactions in the DFG Capital Evidence Document properly engage an applicable exemption and whether any other undisclosed parts of that document fall within the scope of the HMT request.

Conclusion:

104. As the Commissioner has stated, the arguments between the parties have narrowed considerably since the appeal was lodged and pleadings were filed and served. Essentially the main issue now across both appeals is whether the

proposed spending figures and certain other figures redacted from the disclosed information should now be disclosed. There is a secondary issue in the HMT appeal concerning whether further redacted information beyond simply figures in the DFG Capital Evidence document and the DHSC Sheet 8 should be disclosed. The Tribunal accept and find that on balance, in both appeals, the public interest points in favour of such disclosure. We are further persuaded that the public interest in disclosure is heightened by the public benefit arising from the purpose and endeavours of the Second Respondent herein. Access Social Care is a new independent legal charity providing access to justice for people with social care needs. Access is a central hub for social care education and advice, helping individuals to understand and secure their lawful right to social care. By motivating organisations to collaborate to drive culture change on the frontline of social care and to share data on unlawful decision making Access Social Care strives to achieve systems change at all levels of social care decision, This in our view carries significant weight in the public interest balance being in favour of disclosure.

- 105.** On consideration of all of the evidence and submissions before us, the Tribunal conclude that save for the corrected position wherein the Commissioner accepts there is no presumption in favour of disclosure of information when a qualified exemption is engaged (see Paragraph 18 above) the Tribunal find no error of Law in the Commissioners' Decisions nor in the exercise of his discretion therein and we must refuse the appeals.
- 106.** The Tribunal accept and adopt the Commissioners' reasoning in that the impact on both the safe space and chilling effect issues is arguably lessened by the fact that the live policy making at the time of the Request only concerned the policy work relating to ongoing inflationary and other pressures relating to the 2023/2024 budgets rather than live policy making in relation to the 2020 spending review itself. We find this is significant and thus find that disclosure at the point of the Request would not have interfered with the policy making process for which the information was initially submitted.
- 107.** Further the Tribunal also disagree with the suggestion that disclosure has the potential to undermine the principle of collective responsibility. We agree that the Appellant's suggestion that disclosure of the disputed information might undermine this principle is simply not borne out by the contents of the

disputed information. There is nothing that we can identify in the disputed information which we consider would undermine collective responsibility, particularly bearing in mind what is set out above about the limited nature of the 'live policy' making at the time of the Request.

108. Finally the Tribunal also do not understand the Appellant to be relying on s35(1)(b) which is the exemption relating to ministerial communications and collective responsibility, nor do we understand the disputed information to be a "ministerial communication" within the meaning of that section in any event.

109. Accordingly, the appeals are allowed and the Tribunal substitutes a decision that the information falling within the scope of the requests must be disclosed. The information considered by the Tribunal to fall within scope is highlighted on a separate closed annexe together with brief reasons for its selection, neither of which can be communicated to the Second Respondent without undermining the purpose of the appeal.

Judge Kennedy KC
Judge Neville

11 October 2024.

Promulgated

15 October 2024.