IN THE UPPER TRIBUNAL **UT ref: UA-2021-000017-GIRF**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 76 (AAC)**

On appeal from First-tier Tribunal (General Regulatory Chamber) (Information Rights)

Between:

The Cabinet Office

Appellant

- v –

The Information Commissioner

First Respondent

and

Tommy Sheppard M.P.

Second Respondent

Before: Upper Tribunal Judge Wright

Decided after a hearing on 26 September 2023

Representation: **Ivan Hare KC** and **Stephen Kosmin** of counsel for the Cabinet Office
Will Perry of counsel for the Information Commissioner
Raphael Hogarth of counsel for Tommy Sheppard M.P.

Decision date: 5 March 2024

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal dated 10 June 2021 under reference EA/2020/0081P involved the making of a material error of law and is set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

The Upper Tribunal is not able to redecide the appeal. It therefore remits the appeal to redecided by a completely newly constituted membership of the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007. Further pursuant to that section 12(2)(b)(i), the Upper Tribunal directs: (i) that the remitted appeal is to be decided after an oral hearing before the First-tier Tribunal, and (ii) that the appeal is to be decided by the First-tier Tribunal on the basis that section 35 of the Freedom of Information Act 2000 is engaged.

Any further directions, including expedition of the appeal and whether the Cabinet Office remains or needs to be made a party to the First-tier Tribunal proceedings, are for the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. This appeal is about whether the First-tier Tribunal in its decision of 10 June 2021 ("the FTT") erred in law in allowing Mr Sheppard M.P.'s appeal by concluding on the evidence and arguments before it that the requested information did not engage the exemption in section 35(1)(a) of the Freedom of Information Act 2000 ("FOIA"). The consequence of the FTT's decision was that the legal basis for the Cabinet Office refusing the request for information under FOIA was not made out. But for the Upper Tribunal suspending the effect of the FTT's decision until these appeal proceedings concluded, the result of the FTT's decision would have been the provision of the requested information.

2. What this appeal is not about is political questions concerning the merits or demerits of devolved settlements made with the constituent countries of the United Kingdom or whether any of those constituent countries should be independent nations. Nor was it argued as such.

3. This is the open decision on this appeal. A closed decision accompanies it, though it will only be issued to the Cabinet Office and the Information Commissioner.

Relevant background

4. The appeal arises from a request made by Mr Sheppard, M.P., to the Cabinet Office on 3 June 2019 in which he said:

> " Please send me:
>
> - All information relating to polling the general public on their perception on the strength of the union since January 2018. This includes any spending on such polling in each month by your Department.
>
> - All information relating to contact from your Department with Ipsos Mori in the last 6 months for polling on the general public's perception of the state of the union.
>
> I would like the above information to be provided to me electronically at [email address].
>
> If this understanding is too wide or unclear, I would be grateful if you contact me as I understand that under the Act, you are required to advise and assist requesters. If any of this information is already in the public domain, please can you direct me to it, with page references and URLs if necessary."

5. The request was refused by the Cabinet Office on 1 July 2019 under section 35(1)(a) of FOIA. The Cabinet Office told Mr Sheppard that it held the requested information but "it is being withheld as it is exempt under section 35(1)(a) of the Freedom of Information Act 2000…, as it relates to the formulation or development of government policy". The refusal letter continued:

> "Section 35 is a qualified exemption and | have considered the public interest for and against disclosing the information. The Cabinet Office recognises that the decisions ministers make may have a significant impact on the lives of people across the UK. These public interests have to be weighed against a strong public interest that policymaking and its implementation are of the highest quality and informed by a full

> consideration of all the options. For this reason it is important that Ministers make high quality decisions informed by full consideration of the available data. Taking into account all the circumstances of this case, | have concluded that the balance of the public interest favours withholding this information".

6. This decision was upheld on review by the Cabinet Office, on 14 August 2019. The material parts of the review decision read as follows:

> "I have carefully reviewed the handling of your request and I consider that the exemptions at s35(1)(a) of the Freedom of Information Act were properly applied. I believe that the balance of the public interest was fully considered for the reasons set out in our letter of 1 July 2019. I have therefore concluded that I should uphold the decision given in our letter.
>
> I have considered the points you make about the UK's Government's existing Union policy, alongside the interests of both the public and the devolved administrations. Whilst the UK Government does have an overarching policy to maintain the integrity of the Union, this is underpinned by ongoing activity to support the development of that policy."

7. The second quoted paragraph in the review decision letter was written in response to an argument Mr Shepard had made when seeking the review, which he put as follows:

> "The UK government has a confirmed policy on the Union therefore any polling on this topic would be about current government policy rather than its formulation or development. If this polling was about changing the government's policy then | could understand this exemption. However, it could then legitimately be argued that is within not only in the public interest, but also the interests of the devolved administrations, that this information is released."

8. The point made by Mr Sheppard about the polling data relating to the UK Government's settled policy of maintenance of the Union, and the Cabinet Office's response about the polling relating to ongoing activity to support the development of that policy, in many ways encapsulates the key issue arising on this appeal.

9. Given its central importance to this appeal, it makes sense to set out section 35(1) of FOIA here.

> "**Formulation of government policy, etc.**
>
> 35:-(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—
>
> (a) the formulation or development of government policy,
>
> (b) Ministerial communications,
>
> (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
>
> (d) the operation of any Ministerial private office."

10. The Information Commissioner, on a complaint by Mr Sheppard against the Cabinet Office's decision to refuse his request, upheld the Cabinet Office's decision,

and Mr Sheppard appealed against the Information Commissioner's decision to the First-tier Tribunal. Before turning to the FTT's decision, it is worthwhile focusing in some detail on that complaint.

11. Mr Sheppard in making his complaint argued, inter alia, that:

> "It concerns me that if the UK government can use this exemption clause when no specific policy review has been announced or is underway, there is a risk that almost any [freedom of information] request could be refused under this clause, effectively subverting the intention of the legislation."

12. On 3 September 2019 the Information Commissioner, as part of the investigation of the complaint, wrote to the Cabinet Office and asked it a number of questions. One set of questions related to "engaging the exemption" under section 35(1)(a) of FOIA and read, insofar as relevant, as follows:

> "1. Please clarify exactly which government policy or policies the Cabinet Office considers this information relate(s) to.
>
> The Information Tribunal has made it clear that in cases where section 35(1)(a) applies central to the consideration of the public interest test is the timing of any request. This is because once the formulation/development of a policy has been made completed, the risk of prejudicing the policy process by disclosing information is likely to be reduced and so the public interest in maintaining the exemption deserves less weight. (See for example: *DFES v Information Commissioner*, EA/2006/0006, paragraph 75). Furthermore, the Tribunal has made it clear that policy formulation and development is **not** one which is a 'seamless web', i.e. a policy cycle in which a policy is formulated following which any information on its implementation is fed into the further development of that policy or the formulation of a new policy.
>
> It is therefore necessary for the ICO to be able to identify when the policy formulation/development stage to which the withheld information relates ended and the implementation of this policy began.
>
> 2. Therefore, please explain when the Cabinet Office considers the formulation/development of the policy or policies to which this information relates to have been completed, or indeed confirm why the Cabinet Office considers the formulation/development of this particular policy (or policies) to have been ongoing at the time the complainant submitted his request.
>
> The complainant has made a specific point about this argument, namely that the request relates to information on the Government's current policy. Please ensure you address the question of reliance on section 35 where policy has already been developed."

13. The material parts of the Cabinet Office's response, dated 9 October 2019, including passages which need to be redacted in this open decision, read as follows:

> "*Application of section 35(1)(a)*
> You asked for clarification on which government policy we consider the information within scope of the request relates to. The entirety of the information relates to the broad area of attitudes towards the Union of the United Kingdom and the Government's policy commitment to maintain the

integrity of that Union between all four nations: England, Scotland, Wales and Northern Ireland.

Your email also asked about whether this policy area was still within the policy formulation or development stage or whether this had ended and it had progressed to the stage of policy implementation.

REDACTED PASSAGE

To this end, the Cabinet Office has been conducting periodic research to establish a clear understanding of public attitudes toward social, cultural and economic bonds between the UK nations and how these factors drive broader perception of the value of being part of the United Kingdom. Titled the "UK Perspectives Project", the initial research by Ipsos MORI was conducted in March 2018. The full report and data tables from this research were delivered in June 2018.

The Cabinet Office has also commissioned research on Attitudes to Devolution and the Union (conducted by Britain Thinks). The full report and data tables (separately for Wales, Scotland and England) for this piece of work were delivered in May 2018.

The UK Perspectives Project was extended in November 2018 to include a further round of research, which Ipsos MORI successfully bid for. This commenced in April 2019 and concluded in May 2019. Headline findings were delivered to the Cabinet Office on 24 May and final data tables from telephone surveys were delivered on 31 May 2019. As such, at the time of Mr Sheppard's request, the final data had been in the Cabinet Office's possession for a total of three days (clearly not sufficient time for the data to have been absorbed, analysed and its implications given due consideration, let alone for it to have led to an agreed policy direction that could have received Ministerial approval and sign-off). Given this, the Cabinet Office considers that it was entirely correct, at the time of the request, in maintaining that this information still formed a policy consideration in the very early stages of formulation and falling entirely and squarely within the auspice of material protected by section 35(1)(a) of the Act.

To complete this timeline for the ICO's information - though reiterating that this further activity came **after** the date of Mr Sheppard's request - Ipsos MORI presented a policy debrief to the Cabinet Office on 12 July 2019 and a communications debrief on 17 July. The final full slide deck report was delivered on 23 August 2019.

Some of the information in scope is now also in the public domain. We have published a redacted contract for the 2019 research on GOV.UK, in line with government transparency procedures. The contract for the 2018 research is also available on GOV.UK. Additionally, details of the Cabinet Office's research spend on these projects from January 2018 to June
2019 is also available in the public domain on GOV.UK as part of the government's expenditure transparency data (May 2018: £168,857.50

> [including £33,771.50 VAT, which was recovered]; May 2018: £17,550.00 [including £3,510.00 VAT, which was recovered]; October 2018:
> £31,599.50 [including £6,319.90 VAT, which was recovered]; and May 2019: £46,800 [including VAT]).
>
> *Public interest test*
>
> As set out above, when we received Mr Sheppard's request (on 3 June 2019), we did not have the **analysed findings, in full, from the 2019 wave of the UK Perspectives Project research**; all we had received were the initial headline findings (which were a summary of initial interesting results and subject to change following completion of analysis) and the final data tables from telephone surveys. This shows that the research itself (as opposed to any follow-on policy formulation based on the data) was, therefore, still in the early stages; we were yet to be in a position to analyse the results in full and determine how these could be used to influence government policy as part of the Union Strategy.
>
> The Cabinet Office was, therefore, at the time of the request, still in the process of taking forward its work (which is still ongoing) to develop the UK Government's approach and policy for the Union Strategy based upon the commissioned research. **REDACTED PASSAGE**
>
> The Cabinet Office is, therefore, of the opinion that it was entirely correct to withhold this information under section 35(1)(a) as it very clearly falls within the remit of information pertinent to the formulation or development of government policy and that it was also correct in its assessment of the public interest test that release of this information at such an early stage of policy development would be prejudicial to the ability of officials and Ministers to explore and discuss all available options in a free and frank manner, and to understand their possible implications, and would adversely affect the quality of the debate underlining effective decision making. To have released this information at the time of the request (or, indeed, currently) would have been extremely premature and not in the public interest."

14. Even ignoring the redacted passages, this is not the most clearly written letter. In particular, significant parts of what is included under the sub-heading *Public interest test* appears on its face to be more concerned with the logically prior question of whether the requested information related to the formulation or development of government policy.

The FTT proceedings

15. It is an important factual context to the appeal to the FTT that the Cabinet Office was not a party to those FTT appeal proceedings. The Cabinet Office had neither sought to be, nor was it made, a party to Mr Sheppard's appeal to the FTT. In effect, the Cabinet Office relied on the Information Commissioner to make good the case for the request being refused under section 35(1)(a) of FOIA. The Cabinet Office only became a party in the First-tier Tribunal proceedings, as I understand it, after the FTT had made its decision and for the purpose of applying to the FTT for permission to appeal to the Upper Tribunal against the FTT's decision. Whether the Cabinet Office

is, or remains, a party in the proceedings which by this decision I am remitting to be redecided by the First-tier Tribunal *may* depend on the terms on which the Cabinet Office was joined to the FTT proceedings under rules 1(3)(c) and 9 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

16. The FTT allowed Mr Sheppard's appeal on the basis that section 35(1)(a) of FOIA was not engaged in respect of the requested information. Given the range of the competing arguments of the parties about the FTT's decision, I set large parts of that decision out below.

> "8. If the exemption [under section 35(1)(a) of FOIA] applies it is subject to a public interest test which can nevertheless lead to the disclosure of the information if the public interest in disclosure outweighs the public interest in withholding the information.
>
> 9. The Commissioner has produced guidance on the application of s35(1)(a) FOIA which includes the following: -
>
> > 9. Section 35 is class-based, meaning departments do not need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described. The classes are interpreted broadly and will catch a wide range of information.
> >
> > 11. Generally speaking, there is no inherent or automatic public interest in withholding information just because it falls within a class-based exemption. Departments will need to consider the content and sensitivity of the particular information and the effect its release would have in all the circumstances of the case before they can justify withholding the information.
> >
> > 23. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
> >
> > 26…. In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives.
> >
> > 33. To be exempt, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.
> >
> > 34. However, the exemption will not cover information relating purely to the application or implementation of established policy. It will therefore be important to identify where policy formulation or development ends and implementation begins.
> >
> > 42. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy: • the final decision will be made either by the Cabinet or the relevant minister; • the government intends to achieve a particular outcome or

> change in the real world; and • the consequences of the decision will be wide-ranging.
>
> 56. … the policy can be seen as a framework of 'rules' put in place to achieve a particular objective. This framework will set some fundamental details in stone but will also inevitably leave more detailed decisions for those implementing the plan, thus giving some inbuilt flexibility on how it can be delivered. Any such adjustment or decision that can be made within this inbuilt flexibility – i.e. without altering the original objectives or rules – is likely to be an implementation decision rather than policy development.
>
> 79. The key public interest argument for this exemption will usually relate to preserving a 'safe space' to debate live policy issues away from external interference and distraction. There may also be related arguments about preventing a 'chilling effect' on free and frank debate in future and preserving the convention of collective responsibility.

THE DECISION NOTICE

10. The decision notice in this case is dated 27 January 2019 (reference FS50867455). The Commissioner sets out her view that: -

> 11…. the 'formulation' of policy comprises the early stages of the policy process - where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

11. The Commissioner set out the Cabinet Office's explanation for withholding the information: -

> 14. The Cabinet Office explained that the policy in question related to monitoring public opinion with respect to the Union of the United Kingdom and the government's "policy commitment to maintain the integrity of that Union between all four nations: England, Scotland, Wales and Northern Ireland".
>
> 15. It explained a timeline of polling and research it had commissioned on this broad subject including some which postdates the request and therefore falls outside the scope of the Commissioner's investigation. It argued that final data which fell within the scope of the request had only just been presented to it and
>
> therefore it had not yet had the opportunity to give it due consideration. It argued that the information, therefore, formed part of a policy consideration that was in its early stages of formulation.

12. The Commissioner's decision that the exemption in s35(1)(a) FOIA applies is set out in these two paragraphs: -

> 17. In its letter of internal review, the Cabinet Office explained that whilst the UK Government does have an overarching policy to

> maintain the integrity of the Union, this is underpinned by ongoing activity to support the development of that policy.
>
> 18. Having reviewed the information and having considered the arguments of both parties, the Commissioner is satisfied that the information in question relates to the early stages of reviewing or improving existing policy. The Cabinet Office's arguments to the Commissioner were not wholly clear on this point in correspondence with her. However, in its letter to the complainant setting out the outcome of its internal review and other comments in its letter to the Commissioner, the Cabinet Office appeared to argue that the information related to the development of policy rather than, strictly speaking, to its formulation. The Commissioner accepts that policy work is not necessarily conducted according to a prescribed formula, particularly where additional research is required in response to events. She considers this point particularly relevant here….

THE APPEAL

14. The Appellant's appeal is dated 25 February 2020. In a covering letter he states: -

> The Government is clearly not seeking to change policy as it relates to the union between Scotland and the rest of the UK. Indeed, it has been explicit in saying that it has no plans to change the basis of the union, for example, by agreeing a public vote on Scottish independence or introducing further devolution legislation. It seems clear to me that the government's intention is to defend and promote the existing policy rather than to review it. That is not policy development and therefore, I believe, should not be used as an excuse not to provide information under the terms of section 35.

15. The Appellant argues there should be: -

> …. some evidence provided by the government that it is genuinely reviewing policy with a view to considering change. Mere assertion from the government department in question should not be sufficient to invoke this exemption….

18. The Cabinet Office has not made any submissions in this case but its letter sent to the Commissioner on 9 October 2019 explaining its reliance on s35(1)(a) FOIA (as referred to in the decision notice) is now available, and sets out in some detail its view of the position……

21. We note that there are some short-redacted passages in this letter which amplify some of the points made by the Cabinet Office. The Tribunal has carefully considered these but in our view, they do not impact on the conclusions we set out below.

DISCUSSION

22. The issue that the Tribunal has to grapple with in this case is whether the requested information relates to policy formulation or development by the government. If it does not, then the exemption in s35(1)(a) FOIA does not apply and no other basis has been put forward by the Cabinet Office for withholding the information.

23. It is noteworthy that the Commissioner herself seemed uncertain what the Cabinet Office case was in relation to s35(1)(a) FOIA. The Commissioner said that the Cabinet Office's arguments in correspondence to the Commissioner were 'not wholly clear' on the issue as to whether the information in question relates to 'the early stages of reviewing or improving existing policy' (see paragraph 18 of the decision notice, set out in full above). The Commissioner noted that, in its internal review, the Cabinet Office 'appeared to argue that the information related to the development of policy rather than, strictly speaking, to its formulation'. This seems to be a reference to the letter of 14 August 2019 where the Cabinet Office stated that: -

> Whilst the UK Government does have an overarching policy to maintain the integrity of the Union, this is underpinned by ongoing activity to support the development of that policy.

24. The Tribunal has difficulties with this wording, which appears to be an attempt to present polling about the implementation of the established policy (maintaining the integrity of the Union), as activity relating to development of the policy, without explaining in what way the main policy might be developed or altered as a result.

25. The Commissioner states (also paragraph 18) that she considers as particularly relevant 'that policy work is not necessarily conducted according to a prescribed formula, particularly where additional research is required in response to events. However, this is a general statement of the Commissioner's approach and does not explain at all how it is relevant to whether the requested information in this case relates to policy development, even though this appears to be her main reason for so finding.

26. We note an important paragraph from the Commissioner's own guidance which she has not cited in the decision notice (but which we have set out above), which relates to the difference between 'implementation' of policy and 'development' of policy. This states that: -

> 56. … the policy can be seen as a framework of 'rules' put in place to achieve a particular objective. This framework will set some fundamental details in stone but will also inevitably leave more detailed decisions for those implementing the plan, thus giving some inbuilt flexibility on how it can be delivered. Any such adjustment or decision that can be made within this inbuilt flexibility – i.e. without altering the original objectives or rules – is likely to be an implementation decision rather than policy development.

27. This is guidance that is highly pertinent to the requested information in this case, and it seems surprising that the Commissioner has not referred to it. Thus, in this case there is a policy of retaining the union, and the polling investigates public perceptions towards it with a view as to how the policy should be implemented. The polling informs and evaluates the policy and the effectiveness of its communication, in a way which, when we apply the guidance in paragraph 56 of the Commissioner's guidance, leads us to the conclusion that the information relates to the implementation of existing policy rather than to policy development.

28. Having reached that conclusion our view is that the exemption in s35(1)(a) FOIA does not apply to the requested information in this case. As such we do not need to go on to consider the public interest test in this case.

29. However, if we had decided that the information related to the development or formulation of policy, we would comment that it is hard to see how the disclosure of this polling information would in any event inhibit upon any 'safe space' that would be required to consider formulation and development of policy. Thus, the results of the polling from the studies described in the Cabinet Office's letter of 9 October 2019 would be available if the information were disclosed, but nothing would have been made available (because not requested) about any policy development discussed as a consequence of those results.

30. The Cabinet Office argues that it had only had the information for three days when the Appellant made his request which did not give the Cabinet Office enough time to absorb or analyse it. However, the Appellant did not ask for any analysis of the information (which no doubt has taken place since the request was made). He has asked for detail of the polling that has been carried out and the related financial information. The nature of the information was the same at the date of the request and at the date that the Cabinet Office last dealt with the matter, ten weeks later, on 14 August 2019 which was the date of the internal review (and the date when matters of public interest were last considered by the Cabinet Office). It seems to us that the fact that the request was made three days after the Cabinet Office received the information is not a matter which impacts on our deliberations.

31. Against any public interest in favour of non-disclosure, we have already set out the Appellant's summary of the public interest factors identified by the Commissioner's decision notice in favour of disclosure. There is, according to the Commissioner: -

(a) a clear public interest in seeing what information the Cabinet Office is using to assess public attitudes to the Union;

(b) a public interest in understanding more about any analysis the Cabinet Office is undertaking regarding the strength of the Union;

(c) a public interest in transparency regarding the use of public funds;

(d) a clear public interest in knowing more about what that money paid for.

32. In circumstances where, in our view, the 'safe space' argument would not provide a strong public interest against disclosure, it seems to us that these factors, identified by the Commissioner, would have provided a very strong argument in favour of disclosure if we had found that the exemption was applicable.

33. In those circumstances we allow this appeal. Subject to what follows, disclosure of information within scope of the request and in existence at the time the request was made on 3 June 2019 must be disclosed by the Cabinet Office to the Appellant within 28 days.

> 34. The Cabinet Office provided the Commissioner with a large bundle of information which we now have in a CLOSED bundle which was said to be within scope. The Commissioner noted that some of this post-dated the request and that need not be disclosed to the Appellant. There is also personal information in the material in our CLOSED bundle, mostly in the form of names, addresses and telephone numbers, and some other identifying information, which should not be disclosed, pursuant to s40 FOIA, and that should be redacted prior to disclosure to the Appellant.

Relevant statutory framework

17. Section 1 of FOIA provides, subject to immaterial exceptions on this appeal, the core duty under FOIA. It states:

> "**General right of access to information held by public authorities.**
>
> 1(1) A 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."

18. Section 2 of FOIA then deals with the effect of the exemptions found in Part II of FOIA, where section 35 sits, and provides materially as follows:

> "**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.
>
> (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
>
> (a) section 21,
>
> (b) section 23,
>
> (c) section 32,
>
> (d) section 34,
>
> (e) section 36 so far as relating to information held by the House of Commons or the House of Lords,
>
> (ea) in section 37, paragraphs (a) to (ab) of subsection (1), and subsection (2) so far as relating to those paragraphs,
>
> (f) section 40(1),
>
> (fa) section 40(2) so far as relating to cases where the first condition referred to in that subsection is satisfied,
>
> (g) section 41, and

(h) section 44.

19. It is section 2(2) when read with section 2(3) which makes section 35(1) a qualified exemption, but only if the exemption in section 35(1) applies or is engaged at all. If it does not apply then, subject to any other exemption or exclusion (e.g., section 14 of FOIA) applying, the duty in section 1(1)(b) of FOIA requires the public authority to provide the requested information.

20. I repeat for completeness the key terms of section 35(1)(a) of FOIA.

> "35:-(1) Information held by a government department…. is exempt information if it relates to—
>
> (a) the formulation or development of government policy…"

21. The essence of the FTT's decision was that the information requested by Mr Sheppard did not relate to the formulation or development of government policy because that policy was confined to maintaining the union of the United Kingdom.

The Upper Tribunal proceedings

22. The FTT having refused permission to appeal, Upper Tribunal Judge Wikeley refused the Cabinet Office permission to appeal the FTT's decision, on the papers, on 8 September 2021. The essence of his reasons for so doing was that whether section 35(1)(a) of FOIA was engaged was ultimately a question of fact and the Cabinet Office's appeal was no more than an attempt to re-argue the case on its factual merits.

23. The Cabinet Office renewed its application for permission to be reconsidered at an oral hearing and after an oral hearing on 24 May 2022 I gave the Cabinet Office permission to appeal. I did so on the following bases:

> "5. I give permission to appeal to the Cabinet Office because I consider there is merit in its grounds of appeal and because those grounds potentially raise an issue of wider importance concerning the correct scope of section 35(1)(a) of FOIA…...
>
> 6. In essence, as I understood [the Cabinet Office's] submissions, the key and wider ground of appeal is that the First-tier Tribunal erroneously construed section 35(1)(a) as meaning that the identification of a developed and settled high level policy – 'maintaining the Union of the United Kingdom' – necessarily meant that steps or actions related to that policy constituted implementation of that policy and could not amount to formulation of government policy. It is arguable that this is the approach the First-tier Tribunal took in paragraph 27 of its decision. It is further arguable that this is a misreading of the scope of section 35(1)(a) as it arguably would remove from the 'safe space' protection of that sub-section the development or formulation of what may be termed government sub-policies that sit underneath the high level policy. The example used in argument before me was the consideration and development of policy to meet the need for greater 'home political accountability', as a means of maintaining the Union, that then led to the Scotland Act 1998. On the First-tier Tribunal's analysis of section 35(1)(a) in this case the governmental discussions and actions leading up to the Scotland Bill and then the Scotland Act 1998 would not fall within the possible protection of section 35(1)(a) at all as those discussions would not be about the development of

> the policy of 'maintaining the Union' but could only be about implementing that policy. That approach to governmental policy making as protected by section 35(1)(a) is arguably wrong in law. In any event it is a point of law of wide public importance which requires clarification by the Upper Tribunal.
>
> 7. On the other hand, as Mr Sheppard stressed, drawing the scope of section 35(1)(a) such that information about governmental actions taken to defend and promote the policy of maintenance of the Union (that is, actions on the face of it to implement that policy) may be considered to be information that might also relate to the possible formulation or development of new policies, would arguably bring all governmental actions under a high level policy within section 35(1)(a), which arguably cannot have been the statutory intendment. This argument, however, in a way arguably underscores the Cabinet Office's argument that determining the scope of section 35(1)(a) is a point of wider public importance.
>
> 8. Mr Sheppard's point also throws light on another arguable error of law made by the First-tier Tribunal. It is an argument the Cabinet Office also puts forward. This is the argument that the First-tier Tribunal arguably erred in law by failing to interrogate in any sufficient manner (as shown by its fact-finding and reasoning) the evidence before it so as to properly conclude whether the information sought by Mr Sheppard was in fact concerned (only) with implementing the government policy of maintaining of the Union of the four nations of the United Kingdom. One aspect of this may be whether the First-tier Tribunal gave any, or any adequate, consideration to paragraph 48 of the Information Commissioner's guidance on the application of section 35(1)a) of FOIA in deciding whether the information sought by Mr Sheppard in fact related to the formulation or development of government policy or was about the implementation of government policy."

24. Written submissions were then made on the appeal by the parties. Those submissions included closed submissions from the Information Commissioner, submissions on the grounds on which I had given the Cabinet Office permission to appeal and argument about whether the FTT had also allowed the appeal on the alternative basis that, even if section 35(1)(a) of FOIA was engaged, the balance of the competing public interests favoured disclosure of the requested information.

25. The hearing of the appeal took place on 26 September 2023. The hearing included a closed session, which only the Information Commissioner's representatives and the representatives of the Cabinet Office attended. A gist of the closed hearing was then provided to Mr Sheppard and his representatives when the open hearing resumed. That gist set out the following:

> 1.The Cabinet Office provided CLOSED submissions in writing, which were adopted. Additionally:
>
> a. The Cabinet Office addressed redacted passages in the 9 October 2019 letter.
>
> b. The Cabinet Office addressed the timing of the request with reference to the withheld information. Timing here was at a particularly early point in the process of formulation and development of policy.

c. The Cabinet Office addressed the consideration of the withheld information by the FTT, noting:

(i) the purpose was development and formulation of policy, not implementation, (ii) the withheld information was specifically directed to policy development/formulation, (iii) the withheld information concerned high-level policy decisions in matters of general application, and (iv) the nature of the policies considered in the withheld information.

2. The Information Commissioner addressed timing and adopted footnote 9 of his open skeleton argument, which reads "For the avoidance of doubt, the Commissioner accepts there may be cases where section 35 FOIA applies to information which is held before the exact parameters of policy formulation or development have been determined. However, a government department will still be expected to provide a reasonable prediction of the policies or types of policies that such information is likely to relate to".

3. On behalf of Mr Sheppard, the Information Commissioner made submissions regarding the 9 October 2019 letter, including as to: (i) the location of the policy explanation in the letter (i.e. in the public interest balance section), and (ii) the level of detail provided in that redacted explanation (i.e. that it did not discharge the evidential burden on the Cabinet Office in the appeal).

4. UTJ Wright asked about the scope of any remitted appeal. The parties agreed that this question could repeated in OPEN.

Discussion and Conclusion

26. I will first clear out of the way the argument that the FTT decided in the alternative that, even if section 35(1)(a) was engaged, under section 2(2)(b) of FOIA the balance of the public interest in maintaining the exemption was outweighed by the public interest in disclosing the information. Far too much time was expended on this argument. It is quite clear in my judgment that the FTT made no such decision.

27. The language the FTT used in paragraph 22 of its decision, confining the issue to be decided to whether section 35 was engaged, what it said in paragraph 28 of the decision, its use of the conditional phrase "..if we had decided" and the phrase "we would comment" in paragraph 29 of the decision, and the FTT again using the conditional "…if we had found the exemption was applicable" at the end of paragraph 32 of the decision, all point obviously and decisively against the FTT having allowed the appeal in the alternative under section 2(2)(b) of FOIA. The sole basis on which the FTT decided the appeal in Mr Sheppard's favour was because it found section 35(1)(a) of FOIA was not engaged, and it is on that basis that its decision stands or falls on this appeal to the Upper Tribunal.

28. Nor did recourse to case law assist on this issue as the cases to which I was referred – *New South Wales Commissioners v Palmer* [1907] AC 179 and *Jacobs v London County Council* [1950] AC 361 – concerned cases that were decided on two separate grounds: see page 184 of *New South Wales Commissioners* and page 369 of *London County Council*.

29. This may be a salutary lesson about an FTT saying too much in its reasons for its decision. Having decided that section 35(1)(a) was not engaged by the information

requested, there was simply no need for the FTT to go on to decide the appeal on the alternative basis of section being 35(1)(a) engaged. The FTT was no doubt trying to be helpful to the parties in indicating its provisional and *obiter* view of where the balance of the arguments may have lain under section 2(2)(b) of FOIA had that issue been reached on the appeal. However, that positive intention to assist has unravelled and not assisted and may arguably even have been inappropriate in circumstances where the FTT had decided the appeal on a dispositive basis which on the face of it precluded consideration of an alternative basis for deciding the appeal. I am not here saying that an FTT should never make decisions on alternative bases. However , if it is to do so then it must do so clearly. For example, it may have been open for the FTT in this case to have said something like: “Even if we are wrong about section 35(1)(a) of FOIA not being engaged, in the alternative we are satisfied for the following reasons that the public interest in disclosing the information outweighed the public interest in maintaining the exemption”. That clarity was lacking here and it is not what the FTT decided.

30. Turning therefore to whether the FTT erred in law in deciding that section 35(1)(a) of FOIA was not engaged by the information requested by Mr Sheppard, I am satisfied on the arguments before me that it did err in law. This, in essence, is under the second ground on which I expressly gave permission to appeal.

31. Before turning to the second ground of appeal I should deal, however, with the first ground of appeal. A substantial difficulty in addressing and deciding this first ground of appeal is that, in the end, I did not understand any party to be arguing that, as a matter of the law under section 35(1)(a) of FOIA, information which relates to a settled high-level government policy must necessarily only be about implementing that policy and cannot be about the formulation or development of sub-policies connected to that high-level policy. Mr Sheppard did not rely on such an argument for his defence the FTT’s decision. His argument, in essence, was that the FTT had properly decided on the evidence before it that the requested information did not relate to the formulation or development of government policy and it had not therefore erred in law. Nor, as I understood it in the end, did the Cabinet Office. At the hearing before me the Cabinet Office argued that the FTT had failed to address that policy making is based on tiered policy making and, further, that the effect of the FTT’s decision was that sub-policies do not fall under section 35. Both of these are really arguments, as I see it, about what the FTT did on the evidence before it, rather than it taking an *a priori* view of what section 35(1)(a) of FOIA covers. The effect of the FTT’s decision may well have been that no sub-policies fell under section 35(1)(a), but that was the effect in this case in circumstances where, as I hope will become apparent under the second ground of appeal, the FTT had evidence before it about such sub-policies with which it did not grapple. It is perhaps worth adding that nothing in the language of section 35(1)(a) confines it to high-level government policy.

32. Although on first reading what the FTT said in paragraph 27 of its decision might be said to show that it proceeded on the basis that information which relates to a settled high-level government policy can only be information about the implementation of that high-level policy, I do not consider that the FTT was proceeding on the basis that this is what the law required. Had that been its view, I would have expected the FTT to have stated such a central point of law much more clearly than it did. Moreover, it would have needed to address directly the contrary view expressed, in particular, in paragraph 48 of the Information Commissioner’s

guidance (set out below). Rather, I read paragraph 27 as showing only a failure on the part of the FTT to consider all the relevant evidence before it and the wrong identification by the FTT that there was only one policy – the policy of retaining the Union – which arose on the evidence before it.

33. If the FTT had proceeded on the basis that the identification of a settled high-level policy under section 35(1)(a) of FOIA necessarily precludes steps taken in relation to that policy from being anything other than steps to implement that policy, then subject to the caveat that I did not hear any contested argument on this point, I consider it would have erred in law. The example used of the consideration given by the UK government before 1998 for the need for greater devolution or 'home political accountability' as a means of maintaining the Union, which then led to the Scotland Act 1998, would seem to highlight well the error in such an approach. The high-level settled policy was then, as it remains now, the maintenance of the Union of the United Kingdom. The Cabinet Office accepted before me that this high-level policy was not going to change. However, I find it difficult to see how it can sensibly be argued that the discussions amongst civil servants and ministers before 1998 about possible ways in which greater 'home political accountability' might be introduced in Scotland, could only amount under section 35(1)(a) of FOIA to the implementation of the policy of maintenance the Union. The Scotland Act 1998 is a detailed, important and complex piece of legislation, and many of the ideas behind its creation would, at least on the face of it, have involved the formulation or development of government policy. An example of this might be said to be section 29 of that Act and demarcating the areas over which the Scottish Parliament was to have legislative competence and those on which it was not competent to legislate: see, for example, Lord Walker at paragraph [44] of *Martin v Her Majesty's Advocate* [2010] UKSC 10. I find it difficult to see how the governmental discussions that preceded that clause in the Bill before it became the Scotland Act 1998 did not 'relate to the formulation or development of government policy'.

34. Where precisely formulation or development of policy may end and implementing it may begin is not necessarily sharp-edged, but that nuance calls for careful consideration of the evidence requested and to what it relates.

35. The material error of law in the FTT's decision, in my judgment, was the failure of the FTT to interrogate in any sufficient manner, as shown through its fact-finding and reasoning, the evidence before it so as to properly conclude whether the information sought was in fact concerned only with implementing the government policy of maintaining of the Union of the four nations of the United Kingdom. Putting this perhaps another way, I agree with the Information Commissioner's argument that the FTT erred in law by focusing exclusively on the settled "high-level" policy of maintaining the integrity of the Union without having any adequate regard to evidence before it which on its face, and for reasons mainly explained in the closed decision, showed "sub-policies" sitting under that high-level policy which related to the formulation or development of government policy. Because the FTT proceeded on the basis that the Cabinet Office had not identified any way in which the polling information requested by Mr Sheppard related to policies other than the settled policy of maintaining the Union, due to the FTT''s failure to interrogate all the relevant evidence which was before it, this (wrongly) led the FTT to conclude the withheld information could only relate to the implementation of that high-level policy objective, and therefore that section 35(1)(a) of FOIA did not apply.

36. Whether the section 35(1)(a) exemption is engaged is fact specific, just as is the application of section 2(2)(b) of FOIA if section 35(1)(a) is engaged: see paragraph [26] of *Department of Health and Social Care v Information Commissioner* [2020] UKUT 299 (AAC). It therefore requires careful consideration to be given to all relevant evidence. Moreover, I agree with the Information Commissioner, and for the reasons I have given in paragraph 33 above, that where the information requested relates to a settled high-level policy, it does not follow that section 35(1)(a) cannot apply. Nor does it follow that all the information held by the government which relates to that settled high-level policy must necessarily be about implementing that policy. This is because the information may also relate to the formulation and development of sub-policies which sit underneath, or are an aspect of, the settled high-level policy. Equally, however, it does not follow that section 35(1)(a) must apply to such sub-policies as they must still relate to the formulation or development of government policy.

37. The FTT's approach, as shown through its reasoning, was, with respect, too simplistic and failed to have any adequate regard to the evidence before it. It proceeded on the basis that there was only one policy of retaining the Union, that was a settled policy, and therefore, following paragraph 56 of the Information Commissioner's guidance, information gathered under that policy could only be about implementing that settled policy. This did not take account of other parts of the Commissioner's guidance on section 35 of FOIA. Nor, more importantly, did it take account of all the relevant evidence (both OPEN and CLOSED) which was before the FTT.

38. In paragraph 24 of its decision the FTT had criticised the Cabinet Office's review letter of 14 August 2019 and the sentence in it "Whilst the UK Government does have an overarching policy to maintain the integrity of the Union, this is underpinned by ongoing activity to support the development of that policy", on the basis that this failed to explain how the settled policy of retaining or maintaining the Union might be developed as a result of the polling information Mr Sheppard had requested. However, although I can understand the FTT's difficulties with the elliptical phrasing used by the Cabinet Office in that letter, the FTT was exercising an inquisitorial function (see, for example, paragraph [31] of *Lownie v ICO, The FCO and The National Archives* [2020] UKUT 32 (AAC) and paragraph [17] of *Montague -v- Information Commissioner and DIT* [2022] UKUT 104 (AAC) (which was not doubted on the successful appeal from part of that decision to the Court of Appeal)), in exercising that inquisitorial or investigatory function it had to consider all the relevant evidence before it, and that evidence, particularly the CLOSED evidence, at the very least raised a serious issue of whether the polling information requested related to the formulation or development of sub-polices sitting underneath the overarching and settled policy of maintaining the Union.

39. Nor do I accept that the FTT provided any sufficiently reasoned basis showing that it had taken into account, but rejected, any argument that the polling information requested related to sub-policies sitting underneath the high-level policy of maintaining the Union. There is simply nothing in the FTT's decision to make good such an argument.

40. It is indeed striking that the FTT did not grapple with any of the closed materials. It did not provide a CLOSED decision on the appeal. The FTT therefore had to rely on its (OPEN) decision as providing its full reasoning on all relevant issues which arose on the appeal: see paragraphs [16]-[18] of *Davies v IC and the Cabinet Office*

[2019] UKUT 185 (AAC); [2020] AACR 2. At paragraph 21 of its decision the FTT said that it had "carefully considered" the redacted passages in the Cabinet Office's letter of 9 October 2019, but those passages did not impact on its conclusion. Three points can be made about this and it amounting, in my judgment, to an inadequate consideration of all the relevant evidence before the FTT on this appeal.

41. First, paragraph 21 of the FTT's decision says nothing about the *other* CLOSED evidence before the FTT, nor does anything else of substance in the decision grapple with that evidence.

42. Second, there is no reasoned basis for why the redated passages in the 9 October 2019 letter did not impact on the FTT''s conclusion that the only policy to which the polling information related was the high-level policy of maintaining the Union. I will set out in the CLOSED decision why both pieces of the CLOSED evidence were, at the very least, relevant to the issue the FTT decided, and needed specific consideration by the FTT. In fact, bearing in mind that the phrase "relates to" in section 35(1)(a) of FOIA is to be interpreted broadly and to relate to the content of the information requested (see paragraph [79] of *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin); [2010] QB 98 and paragraph [41] of *The Cabinet Office v Information Commissioner* [2014] UKUT 461 (AAC)), in my judgment the requested polling information, whilst it related to the high-level and settled policy of maintaining the Union, *also* related to the formulation or development of (sub) policies connected to that settled policy. It is for this reason that I have directed the First-tier Tribunal to whom this appeal is being remitted to proceed on the basis that section 35(1)(a) of FOIA is engaged by information requested by Mr Sheppard.

43. Third, even ignoring the CLOSED materials, there was sufficient in my judgment in the OPEN parts of the Cabinet Office's letter of 9 October 2019 to call for a reasoned explanation from the FTT for why it did not affect its conclusion that the polling information Mr Sheppard requested only related to the high-level policy of maintaining the Union and not any sub-policies sitting underneath it. The letter of 9 October 2019 does not feature at all in the FTT's discussion, in paragraphs 22-27 of its decision, of why it concluded that section 35(1)(a) was not engaged. However, the OPEN parts of the 9 October 2019 letter which are set out under the sub-heading "*Application of section 35(1)(a)*" raised an issue about the polling information relating to policy formulation. Most obviously, in the context of the information only having been in the Cabinet Office's possession for three days and that not having been sufficient time for the data to be absorbed and given due consideration, this part of the letter spoke about the information potentially leading "to an agreed policy direction that could have received Ministerial approval and sign-off". As a result of this, the letter continues, the Cabinet Office considered it had been correct for it to maintain that the requested information "still formed a policy consideration in the very early stages of formulation" and thus falling entirely and squarely within section 35(1)(a) of FOIA. It is true that the specific policy or policies are not identified in the OPEN part of the letter. However, the just quoted passages follow on from the letter having contrasted 'policy formulation or development' (connected to maintenance of the Union) with 'policy implementation', and nothing in the passages which I have just quoted from was stated to be about implementation of the policy of maintenance of the Union. This evidential argument in the 9 October 2019 letter called for reasoned consideration by the FTT, which it did not provide.

44. In addition, there was further consideration of the policy formulation or development v implementation dichotomy later in the letter. Admittedly this was under the sub-heading '*Public interest test*'. However, given the FTT's inquisitorial jurisdiction and the stated uncertainties and difficulties the FTT had with some of the evidence before it, in my judgment it needed to go beyond the demarcation of this sub-heading and consider the substance of what was said in this part of the 9 October letter. In particular, the FTT needed to grapple with and explain why the Cabinet Office's points about "follow-on policy formulation" based on the polling data and analysing the results in full "and determine how these could be used to influence government policy as part of the Union Strategy", did not show any policy formulation or development.

45. The above is sufficient to dispose of this appeal. However, it is instructive to note other parts of the Information Commissioner's guidance on section 35(1)(a) of FOIA which the FTT did not set out. The guidance in place at the time of the FTT's decision was a quite lengthy document (it has since been updated, on 13 January 2023, but with no material changes), extending to 239 paragraphs. However, the following excerpts from it were plainly relevant to the issue with which the FTT had to grapple:

> "**Formulation v implementation**
> 43. The Commissioner understands the term 'formulation' of policy to refer to the early stages of the policy process where options are generated and analysed, risks are identified, consultation occurs, and recommendations or submissions are put to a minister who then decides which options should be translated into political action.
> 44. Given the variety of different ways in which policy can be made, it is not always easy to identify exactly when a policy is finalised so that formulation ends and implementation begins Again, there is no single rule: this will depend on the facts of each case.
>
> 48. For complicated policies, it is possible that formulation may continue even after [a new policy has been announced]. In some cases the government announces a high-level policy, or passes a 'framework' bill into law, but leaves the finer details of a policy still to be worked out. The high-level policy objective has been finalised, but detailed policy options are still being assessed and debated. Later information relating to the formulation of the detailed policy will still engage the exemption.
> 49. Whether such decisions on detail remain formulation of policy, or are really about implementation, is a matter of degree. In line with the key indicators of policymaking set out above, decisions on detail are more likely to constitute policy formulation if they require ministerial approval, there are a range of options with differing outcomes in the wider world, and the consequences of the decisions are wide-ranging.
>
> **Development v implementation**
> 54. The Commissioner understands the term 'development' of policy to include the process of reviewing, improving or adjusting existing policy.
> 55. Not every decision or alteration made after an original policy was settled will amount to the development of that policy. If policy is a plan to achieve a

> particular outcome in the real world, the development of that policy is likely to involve a review of its intended outcomes, or a significant change to the original plan. By contrast, minor adjustments made in order to adapt to changing circumstances, avoid unintended consequences, or better achieve the original goals might more accurately be seen as decisions on implementation.
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> 56. In this context, the policy can be seen as a framework of 'rules' put in place to achieve a particular objective. This framework will set some fundamental details in stone, but will also inevitably leave more detailed decisions for those implementing the plan, thus giving some inbuilt flexibility on how it can be delivered. Any such adjustment or decision that can be made within this inbuilt flexibility – ie without altering the original objectives or rules – is likely to be an implementation decision rather than policy development.
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> 57. Who makes the decision will be a helpful indicator here: as ministers have the final say on government policy, only a minister can approve a change to that policy. Any decisions or adjustments made by someone else must therefore be implementation or management decisions, rather than policy development.
>
> 58. However, not every decision by a minister is automatically policy development. Ministers may sometimes be involved in making other decisions about the application, implementation or presentation of existing policy.
>
> 59. The more limited and case-specific the consequences of a decision, the less likely it is to be policy development. A decision on how existing rules apply to an individual case is likely to be a decision on the application of existing policy. For example, decisions about individual applications for licenses or grants will rarely constitute government policymaking, even if the decision has been made by a minister.
>
> 60. Nonetheless, some such decisions may be so novel, high-profile or politically sensitive that they inevitably trigger a decision by the minister on whether the existing policy is appropriate. The more wide-ranging the consequences of the decision and the more unusual or politically sensitive it is, the more likely that it involves an element of policy review or development."

46. No party suggested the FTT erred in law in failing to set out in its decision, or otherwise have express regard to, paragraph 48 of this guidance. However, I venture to suggest that had the FTT had regard to these passages in the guidance its central conclusion, as expressed in paragraph 27 of its decision, may have appeared less obvious. By way of example only, the reference in paragraph 57 of the guidance to Ministerial involvement taken with the evidence in the Cabinet Office's letter of 5 October 2019 of "an agreed policy direction that could have received Ministerial approval and sign-off" very arguably gave rise to an issue about whether the polling data might have been related to the formulation or development of a government policy that sat underneath the high-level settled policy of maintaining the Union.

47. In terms of whether I should redecide the appeal or remit it to be redecided before an entirely freshly constituted First-tier Tribunal, in the end none of the parties before me argued with any real force against remittal to the First-tier Tribunal if a further hearing was needed. This was perhaps inevitable given that at the end of the hearing before me it was clear to me that redeciding the first instance appeal would need to wait until another day, whichever tribunal was to redecide it. On this point, I reject the argument made on behalf of Mr Sheppard that I could decide the public

interest balance test on the written evidence and arguments before me and therefore without the need for any further hearing. He relied in this regard on what was said in paragraph [46] of *Davies v IC and the Cabinet Office* [2019] UKUT 185 (AAC); [2020] AACR 2 and contrasted the factors which led the Upper Tribunal to redecide the appeal in that case with those which had led the Upper Tribunal to remit the appeal in *Natural England v Warren* [2019] UKUT 300 (AAC); [2020] PTSR 565, at paragraph [189]. I am not persuaded by this argument. First, the FTT did not decide the public interest test or even purport to do so. There are therefore no findings of the FTT on this issue and so it needs to be decided afresh and for the first time. Second, little if no fresh argument was made before me at the hearing as to where the balance of the competing public interests in fact lay. Third, although the Cabinet Office was very late to the First-tier Tribunal proceedings before the appeal to the Upper Tribunal, it either now is a party to those proceedings or is likely to be made a party. In those circumstances, fairness may well require it to be able to present evidence and argument about the competing public interests to whichever tribunal is to redecide this appeal; or at least there must be opportunity for the Cabinet Office to present argument about it being able to do, and that time was not available at the hearing before me. Allied to this last point, I accept the argument of the Information Commissioner that the Cabinet Office may have an at least arguable case that it should be allowed to file further evidence and submissions, not only because the application of the section 35 exemption "reflects the public interest in confidential information held by a government department relating to the formulation of government policy remaining confidential" (per paragraph [100] of *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin)), but also because the statutory decision makers (i.e., the Information Commissioner and the FTT) have to date struggled to understand fully the Cabinet Office's arguments. The views of the Upper Tribunal Judge Markus QC (as she then was) in paragraph [31] of the case *Lownie*, drawing on what the Upper Tribunal had said in *Browning v IC and DBIS* [2013] UKUT 236 (AAC), are pertinent to the first of these points. As Judge Markus put it:

> "31….the FTT stands in the shoes of the Information Commissioner and its proceedings are inquisitorial. The FTT's task is to determine whether a public authority has complied with its obligations under FOIA. In some cases the outcome will affect not only the immediate parties to the appeal. It is both a normal and desirable feature of such proceedings that a party is able to amend its position where that assists the FTT to reach the correct conclusion……To limit the procedural flexibility of the FTT in information rights cases would hinder the tribunal in discharging its function. As the Upper Tribunal said in *Browning v IC and DBIS* [2013] UKUT 236 (AAC) at paragraph 60, the FTT's function in such appeals is
>
> > "investigatory and is to see that FOIA is properly applied to the circumstances …The existence of those exemptions means that the statutory scheme requires that the Requested/Disputed Information must be protected until it has been decided whether it may be revealed. If this were not the case, the purpose of the FOIA process and the appeal to the First-tier Tribunal would be destroyed."

48. In all these circumstances, I cannot identify any good reason for the Upper Tribunal to retain the appeal to redecide it, but there are good reasons for the First-

tier Tribunal to redecide it (see, again, *Natural England v Warren* at paragraph [189]), not least it is the expert evaluative body charged with deciding such appeals.

49. I apologise finally to the parties for the time is has taken me to reduce this decision to writing. This has arisen due to the pressure of other work. The delay is not because of any real difficulty in deciding the legal issues in this appeal.

Approved for issue by Stewart Wright
Judge of the Upper Tribunal

On 5th March 2024
Corrected on 9th May 2024