



Neutral Citation Number: [2026] UKUT 140 (AAC)  
**Appeal No. UA-2024-001742-GIA**

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Between:**

**The Cabinet Office**

**Appellant**

**- v -**

**The Information Commissioner**

**First respondent**

**-and-**

**Daryl Peagram**

**Second respondent**

**Before: Upper Tribunal Judge Wright**

**Hearing date: 15 December 2025**

**Representation:**

**Appellant:** Robin Hopkins of counsel

**First respondent:** Leo Davidson of counsel

**Second respondent:** Self-representing but did not attend the hearing

*On appeal from:*

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

**Tribunal Case No:** EA/2022/0153

**Tribunal:** Judge Lynn Griffin and tribunal members Kate Grimley Evans and Paul Taylor

**Decision Date:** 21 August 2023

**SUMMARY OF DECISION**

*This is a decision about whether, under section 42(2) of the Freedom of Information Act 2000, confirmation of the fact that the then Prime Minister had sought legal advice on the lawfulness of the Covid-19 lockdown of 23 March 2020, on the hypothesis that such advice had been sought, would have revealed information to which legal advice privilege applied. The FTT decided, as a preliminary issue, that it would not.*

*The Upper Tribunal allows the Cabinet Office’s appeal, set asides the FFT’s decision and, in redeciding the appeal, decides that legal advice privilege (and s.42(2)) applied to the hypothesised advice sought by the Prime Minister.*

**KEYWORD NAME (Keyword Number) INFORMATION RIGHTS (93); FREEDOM OF INFORMATION- QUALIFIED EXEMPTIONS (93.5)**

*Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judges follow.*

**DECISION**

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 21 August 2023 under case number EA/2022/0153 was made in error of law. Under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007, that decision is set and I remake the decision.

The remade decision is to allow the Cabinet Office’s appeal from the Information Commissioner’s Decision Notice of 19 May 2022. The Cabinet Office was entitled to rely on section 42(2) of the Freedom of Information Act 2000 and so could neither confirm nor deny whether it held the information falling within parts (2) and (2) of the request made to it by Mr Peagram on 17 December 2020.

**REASONS FOR DECISION**

**Introduction**

1. Few, if any, people in the United Kingdom will forget the Covid-19 lockdown announced by the then Prime Minister on television on 23 March 2020.
2. This appeal is about a request for information made by Mr Peagram in relation to that lockdown. More particularly, it is about whether the FTT properly addressed and answered whether section 42(2) of the Freedom of Information Act 2000 (“FOIA”) applied in respect of advice sought by the Prime Minister about the lawfulness of that lockdown, on the hypothesis that such advice been sought.

**Relevant factual background**

3. In the first few months of 2020 the coronavirus pandemic (Covid-19) spread in the United Kingdom, with infections and deaths from the pandemic rising at an increasing and alarming rate. On 23 March 2020 the then Prime Minister, Boris Johnson MP, gave an address to the nation on television in which he announced restrictions on the freedom of citizens to move and socialise. These restrictions were intended to “slow the spread of the disease”. Prior to 23 March 2020 the Government had only requested people to stay at home. However, by the 23 March announcement the Prime Minister gave the British people a very simple instruction: “you must stay at home”.

4. Legislation was then enacted under the Public Health (Control of Disease) Act 1984 to effect these restrictions: see the Health Protection (Coronavirus Restrictions) (England) Regulations 2020.
5. On 17 December 2020 Mr Peagram made the following request for information under FOIA to the Cabinet Office:

“Legal advice on pre-regulations lockdown of 23/03/20:

I make the following request for disclosure regarding the Prime Minister's address to the nation on 23/03/20 (archived at <https://www.gov.uk/government/speeches/pmaddress-to-the-nation-on-coronavirus-23-march-2020>).

I request:

- (1) any discussion of whether to seek legal advice on the lawfulness of the PM's lockdown declaration of 23/03/20,
- (2) whether the PM sought the same, and
- (3) if so, such request and advice.”

6. The Cabinet Office's response to this request was made on 20 January 2021. It refused to confirm or deny whether it held any of the requested information relying, for the purposes of this appeal, on section 42(2) of FOIA. That approach was upheld by the Cabinet Office following an internal review. (It also relied on section 35(3) of FOIA to refuse to confirm or deny whether it held any of the requested information, but section 35 is not an issue on this appeal.)
7. Mr Peagram then complained to the Information Commissioner under section 50 of FOIA. He argued that there was a strong public interest in knowing whether *“the PM put 60 million people under house arrest without legal authority”*.
8. The Information Commissioner in his decision of 19 May 2022 decided (insofar as is relevant) as follows:

“2. the Cabinet Office has failed to demonstrate that issuing a confirmation or a denial would, in itself, disclose information to which legal professional privilege could be maintained and is therefore not entitled to rely on section 42(2) of FOIA...

3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.

- Confirm or deny whether it holds any information falling within the scope of the request.
- To the extent that any information is held, either disclose that information or issue a refusal notice that complies with section 17 of FOIA..”

9. The material parts of the Information Commissioner's reasons for this decision are worth setting out. They read:

“15. It seems reasonably clear to the Commissioner that if any information was held by the Cabinet Office it would be likely to attract legal privilege because it must, by definition, relate to communications between a client (the government) and their legal adviser for the dominant purpose of seeking or imparting legal advice on the actions the government was about to take. Any information that was not legal advice, or did not relate to the particular action, would not fall within the scope of the request.

16. However, it is not sufficient for hypothetical information to be covered by privilege. In order for the Cabinet Office to demonstrate that it is entitled to rely on this exemption to neither confirm nor deny whether it holds information, it must demonstrate that just confirming (or denying) that information was held would, in itself, disclose legally privileged information.

17. The Commissioner’s guidance on section 42 makes clear that the mere fact that a public authority has sought advice, or that advice has been provided, does not, on its own, disclose privileged information. In order to engage the exemption, a confirmation or a denial must disclose something about the substance of the actual advice that was provided. 1

18. The guidance shows an example contrasting two requests, for ostensibly the same recorded information, that have been worded differently. In request A, the requester asks for:

“a copy of any legal advice you have obtained that would allow you to sell the kitchens of Borset High School to a private catering company.”

Request B seeks:

“a copy of any legal advice you have obtained about selling the kitchens of Borset High School to a private catering company.”

19. The guidance goes on to explain that the public authority receiving request A would probably be entitled to rely on section 42(2) to neither confirm nor deny holding any information. Confirming that information was held would not only reveal that advice had been sought, but would also reveal the content of any legal advice (ie. it would reveal whether the sale was, or was not, legal - because any advice showing that the sale wasn’t legal would not fall within the scope of the request). By contrast, the public authority would not be able to refuse to confirm or deny holding information within the scope of request B because providing a confirmation or a denial would only reveal the fact that legal advice had been provided. It would not reveal the substance of that advice.

20. In his letter of 21 January 2022, the Commissioner noted that the request did not seek only legal advice that confirmed that a lockdown was lawful. It only sought legal advice relating to “the lawfulness” of the action. He asked the Cabinet Office to explain why issuing a confirmation or a denial would involve disclosure of privileged information.....

22. In the Commissioner’s view, the Cabinet Office has failed to interpret the request properly as it has failed to distinguish between a request seeking legal advice on whether a particular action is “lawful” and one seeking legal advice on the “lawfulness” of a particular action. Those two words may be similar, but they are not the same.

23. “Lawfulness” implies a spectrum of different positions ranging from actions that will always be lawful to actions that will never be lawful. In between there will be a whole range of nuances reflecting the particular circumstances or particular processes that have been or must be followed for an activity to be lawful. However what’s important is that it is not a binary distinction.

24. The Commissioner is therefore of the view that the Cabinet Office could confirm that it had sought legal advice (if it had in fact done so) without indicating whether that advice had concluded that the proposed action was or was not lawful. Therefore the Cabinet Office could confirm or deny that it had sought legal advice without revealing the substance of any advice provided and thus without revealing any information which would be covered by legal privilege.

25. Whilst at least some of the information the Cabinet Office may hold is likely to engage section 42(1) of FOIA, the Commissioner does not consider that the Cabinet Office is entitled to rely on section 42(2) of FOIA to refuse to confirm or deny that it holds information.”

10. The Cabinet Office then appealed to the First-tier Tribunal (“the FTT”). By that stage it had answered part 1 of Mr Peagram’s request by telling him it did not hold information within the scope of that part of the request (i.e. information about any discussion of whether to seek legal advice on the lawfulness of the PM’s lockdown declaration of 23/03/20.)

### **The FTT proceedings**

11. The appeal to the FTT was about parts 2 and 3 of Mr Peagram’s request. On appeal the Cabinet Office argued (a) that section 42(2) of FOIA was engaged, (b) that the public interest favoured maintaining that exemption, and (c) the public interest also favoured maintaining the section 35(3) FOIA exemption.
12. It was proposed by the Cabinet Office, and then agreed by the parties to the appeal, that the appeal be decided in stages, with the FTT being asked first to decide, as a preliminary issue, whether confirmation or denial in response to Mr Peagram’s request would reveal information to which legal professional privilege applies. That preliminary issues proceeded on the basis of the following facts agreed between the parties (as set out at paragraph 7 of the FTT’s decision):

“i. In early 2020, the Covid-19 pandemic spread in the UK. The Government encouraged people to reduce social contact.

ii. On 23 March 2020, the Prime Minister, Boris Johnson MP, gave a televised address in which he announced the imposition of legal restrictions that comprised the first Covid-19 lockdown in England. The text of that address is published here: <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020>.

iii. Those legal restrictions were set down in the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 that came into force at 1pm on 26 March 2020.

iv. On 17 December 2020, the Cabinet Office received the FOIA request at issue in this appeal. That request was for: “(1) any discussion of whether to

seek legal advice on the lawfulness of the PM's lockdown declaration of 23/03/20; (2) whether the PM sought the same, and (3) if so, such request and advice.”

v. On 20 January 2021, the Cabinet Office provided its response to that request. The Cabinet Office relied on sections 42(2) and 35(3) FOIA in refusing to confirm or deny whether it held information within the scope of its request. It maintained that position upon internal review.

vi. In its grounds of appeal, the Cabinet Office confirmed that it held no information within the scope of part 1 of the request. It maintained that it was entitled to adopt a Neither Confirm Nor Deny (NCND) position in response to parts 2 and 3 of the request, by virtue of sections 42(2) and/or 35(3) FOIA.

vii. The Information Commissioner opposes the appeal.”

13. That preliminary issue resolved itself into two questions:

“(1) On the hypothesis that the Prime Minister sought legal advice on the lawfulness of the lockdown announced on 23 March 2020, would confirmation of that fact in response to the FOIA request of 17 December 2020 have revealed information to which legal advice privilege applied?

(2) If so, was section 42(2) FOIA engaged as regards parts 2 and 3 of that FOIA request?”

14. The FTT answered these two questions as follows:

“(i) On the hypothesis that the Prime Minister sought legal advice on the lawfulness of the lockdown announced on 23 March 2020, confirmation of that fact in response to the Freedom of Information Act 2000 (FOIA) request of 17 December 2020 would not have revealed information to which legal advice privilege applied.

(ii) Section 42(2) FOIA is not engaged as regards parts 2 & 3 of that FOIA request.”

15. The material parts of the FTT's reasoning are as set out below.

“12. It does not appear to be in dispute that the terms of any request for advice would attract legal advice privilege, or at least be capable of doing so. Nor does it appear to be disputed, that the substance of the advice itself would also be covered. Neither of these matters require resolution by us under the terms of the issues to be considered within the scope of the preliminary issue.

13. The impact on part 3 of the request is reliant on our decision on part 2. If s.42(2) FOIA is not engaged as to part 2 of the request (whether the PM sought legal advice on the lawfulness of the PM's lockdown declaration of 23 March 2020) it will not be engaged as to the question of whether the Cabinet Office hold or do not hold a copy of the advice in question. If s.42(2) FOIA is engaged as to part 2 then, a fortiori, it will be engaged as to part 3.

20. The principles to be applied can be summarised as follows

- i. Legal professional privilege includes litigation privilege and legal advice privilege. It is the latter that is relevant in this case
- ii. Legal advice privilege attaches to confidential communications between a lawyer and their client in a legal context, for the dominant purpose of seeking or giving legal advice.
- iii. A communication need not be in any specific form to be covered by legal advice privilege. Conversely, marking a document as subject to privilege or “without prejudice” will not be determinative of whether it attracts the protection of legal professional privilege.
- iv. Legal professional privilege exists to protect the confidential relationship that exists between a lawyer and their client. The privilege is that of the client and not the lawyer. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent if they are to be able to consult their lawyer with confidence placing all relevant facts before the lawyer.
- v. It does not matter who the client is, everyone is entitled to the protection of legal professional privilege, including the Prime Minister, where the requirements are met for it to be engaged.
- vi. What is protected from revelation is the substance of the legal advice.
- vii. Legal advice privilege will extend to documents/information which provide evidence of the substance of privileged communications or that give a clue as to the legal advice given or from which the substance of the legal advice given to a party could be inferred.
- viii. The fact of whether a public authority has sought or received legal advice is not itself legally privileged, unless disclosing that fact would reveal the substance (content) of those communications.

21. The Information Commissioner has issued guidance, we note that the guidance does not bind us, nor is it our function to review that guidance, but we take the view that it is a clear and correct statement of the legal principles to be applied in this context as revealed in the body of caselaw.

22. The Cabinet Office submits that there is no rule or principle to the effect that references to the subject matter of advice sought are incapable of attracting privilege. We agree. The issue to decide in each case is whether any reference to the subject matter of the advice sought reveals or provides evidence of the substance of the communications protected by legal advice privilege.

23. It is important to distinguish between the fact of a request for advice on a topic having happened and the instructions which go to the provision of legal advice. In this context “instructions” means the content of the request for advice sent by the client to the lawyer; this is how the word is widely used and clearly how it was used in those cases to which we have been referred by the Cabinet Office. Once again what must be considered is whether the material in issue reveals the substance of the privileged communications. In our view there is nothing in *Brown v Bennett (Wasted Costs) (No 2)* [2002] Lloyd's Rep. P.N. 242 or *Kerman v Akhmedova* [2018] EWCA Civ 307 which indicates to the contrary.

#### Analysis and conclusions

24. The Cabinet Office submits that confirmation of the hypothetical fact that the Prime Minister sought legal advice would “clearly have revealed information to which legal advice privilege applied” and that the Information Commissioner

applied the incorrect test as they did not take account of whether such confirmation would “give a clue” or “disclose the trend”. The submission is that “On the hypothesis that the Prime Minister did so, confirming that he did so would reveal something substantive about a confidential communication by which a client (the Prime Minister) asked his lawyers for advice.” What is relied upon as being revealed is the fact that advice was sought on a particular topic, it is averred that “privilege will apply where confirmation would reveal that the client had asked his lawyers whether the announcement of a specific set of measures fell within the Government’s legal powers.”

25. We agree that the terms of the request made under FOIA are important to consider. The heading of the request made via the *WhatDoTheyKnow* website was “Legal advice on pre-regulations lockdown of 23/03/20” and the explanation of the requestor’s arguments on the issue of the public interest included with the request give further context to the request. It is clear to us from the terms of the request and its context that the requestor had understood the Prime Minister to have imposed a lockdown during the speech he gave on 23 March 2020, in advance of the coming into force of the regulations on 26 March 2000. Whether that was the intent of the Prime Minister’s address to the nation is not for us to decide.

26. The requestor was asking (request part 2) whether legal advice had been sought about what the Prime Minister was to say in his speech on 23 March 2020. The addition of the word “lawfulness” adds nothing to the meaning of the request. One may ask a lawyer for advice about whether a proposed action is lawful but that is the same as asking for legal advice from a lawyer; lawyers give advice on what is lawful and what is or may not be in accordance with law in their opinion.

27. Knowing the fact that someone has asked for advice about a proposed action reveals nothing of the substance of that advice, even if that proposed action is taken subsequent to receiving that advice. This is because a client is not bound to accept his lawyer’s advice.

28. The example given in the Information Commissioner’s guidance at paragraph 44 illustrates the distinction between w[h]ere confirming or denying whether information is held would reveal the content of the legal advice and where such a confirmation or denial would not disclose any legally privileged information. The example given that engages s.42(2) reads

Mrs Brown asks Borsetshire County Council for “a copy of any legal advice you have obtained that would allow you to sell the kitchens of Borset High School to a private catering company”.

In this example if the council confirm or deny whether they hold the information they will be revealing not only whether they took legal advice but also that the substance of that advice was that they were “allowed” to sell the kitchens.

29. If we take that example but where s.42(2) does not apply, and insert the concept of “lawfulness” this further illustrates that it adds nothing to the request.

Mrs Brown asks Borsetshire County Council for “a copy of any legal advice you have obtained about **the lawfulness of** selling the kitchens of Borset High School to a private catering company”.

Confirmation or denial of whether advice about the lawfulness of selling the kitchen does not reveal whether the advice was that the sale would be lawful or if the lawyer advised that it would not or may not be lawful.

30. It is not necessary to examine all the ways in which a lawyer might interpret and approach a request to consider the “lawfulness” of a proposed action, but we do agree with the Information Commissioner’s submission that as the concept of lawfulness is a broad one a confirmation that information is held and that the Prime Minister had sought advice would not disclose the substance of what advice was sought. Nor would it reveal whether any advice was given in response, still less what that advice was.

31. Confirmation that advice has been sought on a topic tells you nothing substantive about the communication between the client and their lawyer.

32. The terms of the request are clear, it asks whether the Prime Minister sought advice and that is the hypothesis on which we are asked to proceed. Whether or not others in government may have done so is not relevant to whether the duty to confirm or deny applies to these facts as agreed.

33. When a lawyer is asked whether they have given advice to a client then they will refuse to answer the question. This is a matter of client confidentiality. It is not a response to an FOI request. Here, we concern ourselves with the Freedom of Information Act, particularly the wording of section 42(2). This wording makes it clear that a neither confirm nor deny response can only be used in a situation w[h]ere confirming or denying whether information is held 'would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings'.

34. We bear in mind the judgment of Neuberger J in *Brown v Bennett (Wasted Costs) (No 2)* [2002] Lloyd's Rep. P.N. 242. The issue in that case was whether counsel could be required to give oral answers to questions relating to their instructions. Neuberger J’s reasoning was that

*“By answering the Question raised by the applicant, counsel would be infringing Mr. and Mrs. Brown’s privilege, bearing in mind that they would inevitably be revealing, albeit to a very limited extent, the contents of their Instructions or their Briefs”*

On the facts, the Neuberger J concluded that the questions in fact went only to non privileged documents however, the judgment is clear that if questions were posed, the answers to which would reveal the contents of counsel’s instructions, those questions would not need to be answered, because answering would reveal privileged information.”

### The relevant statutory provisions

16. Section 1 of FOIA provides, subject to immaterial exceptions on this appeal, the foundational 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.”

17. Section 42 of FOIA provides as follows:

**“Legal professional privilege.**

42.(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

18. Sections 57 and 58 of FOIA are concerned, respectively, with the right of appeal to the FTT and the FTT’s duties and powers on an appeal to it. They provide relevantly as follows:

**“Appeal against notices served under Part IV.**

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

**Determination of appeals.**

58.-(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

It is settled by case law that the language of “not in accordance with the law” in section 58(1)(a) does not import a secondary judicial review test of legality. Instead, the FTT has a full merits jurisdiction on an appeal: see paragraphs [45]-[46] of *Information Commissioner v Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC); [2018] AACR 29 and paragraph [21] of *Lin v ICO* [2023] UKUT 143 (AAC).

## **The parties’ arguments in summary**

### *The Cabinet Office’s arguments*

19. The essence of the Cabinet Office’s argument is that the FTT erred in law in giving the wrong answer posed to it by the hypothetical question and it erred in law in further respects.

20. The Cabinet Office clarified before me that erring in law by giving the ‘wrong’ answer meant that the FTT had arrived at a decision that no reasonable FTT could have arrived at on the agreed and hypothesised facts. In other words, the FTT’s ‘outcome’ decision was *Wednesbury* irrational or perverse. In so contending the Cabinet Office argued that a client’s instructions to their lawyer (including their request for legal advice) constitute a communication attracting legal advice privilege. The answering of the hypothetical question in this case would disclose privileged information. The terms of the request were about advice on the *lawfulness* of the specific lockdown that was announced on 23 March 2020. Properly construed, Mr Peagram was asking whether the Prime Minister had instructed lawyers to advise him on whether the imposition of that particular lockdown fell within the Government’s legal powers. On the hypothesis that such advice was sought by the Prime Minister, confirming that he did so would obviously reveal something substantive about a confidential communication by which the Prime Minister (as client) asked his lawyers for advice. Putting this another way, under section 42(2) of FOIA confirming that such a request for advice was held would equate to revealing that this particular client had asked his lawyers whether these specific lockdown measures could lawfully be imposed, and the FTT’s conclusion to the contrary was legally perverse.
21. In oral argument this point was illustrated the argument that if the Prime Minister had been in court and asked if he had sought advice from his lawyers on the lawfulness of the lockdown announced on 23 March 2020, he would have been entitled to refuse to answer that question as answering it would have breached legal professional (or advice) privilege.
22. The other errors of law the Cabinet Office contended the FTT had made were as follows. (In the current taxonomy of error of law irrationality and *Wednesbury* they might be characterised as process errors as opposed to the above alleged ‘outcome’ error: see *KP v Foreign Secretary and Home Secretary* [2025] EWHC 370 (Admin).)
23. First, the FTT erred as to the meaning and interpretation of the request by wrongly characterising it (at para. 26 of its decision) as being about what the Prime Minister was to say in his speech. The request was not about the speech *per se* but was in term about the lawfulness or the lockdown declared on 23 March 2020. The FTT ought, but failed, to construe the request as asking whether the Prime Minister had instructed lawyers to advise him on whether the imposition of the particular lockdown announced on 23 March 2020 fell within the Government’s legal powers. Part of the FTT’s error lay in its view that the word “lawfulness” added nothing to the request because, apparently, the FTT considered any request for advice from a lawyer is necessarily for advice about whether something is lawful. That, however, was wrong as legal advice privilege extends also to advice about what should prudently be done in the relevant legal context: per Lord Scott at paragraph [34] of *Three Rivers Council v The Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48; [2005] 1 AC 610.

24. Second, although the FTT was correct to direct itself that the answer to the preliminary issue question would need to reveal the “substance” of a privileged communication, it erred by taking too narrow an approach to how an answer can reveal something of substance. In particular, inferences about the substance of a privileged communication can suffice, including documents or information which give a clue as to the legal advice given or betraying the trend of the legal advice: per *In the Edwardian Group Limited* [2017] EWHC 2805 (Ch) at paragraph [34] and [39]. The FTT noted these points (at paragraph 20(vii) of its decision), but failed to apply them to the hypothetical question in issue. The FTT ought to have asked whether the answer to that question would have revealed would have given a clue about, or betrayed the trend of, the advice sought: to which ‘Yes’ was the only answer given the clarity and specific nature of the hypothetical request for advice.
25. Third, this restrictive approach of the FTT led it, at paragraphs 20(vi) and 27 to 29 of its decision, to wrongly consider (and construe the Information Commissioner’s guidance therein quoted as meaning) that legal advice privilege would only be engaged where the substance of the legal advice given was itself revealed. That approach was wrong as a matter of law because legal advice privilege also extends to the continuum of communications between lawyer and client and that continuum must be construed broadly: per paragraph [69] *Civil Aviation Authority v R(Jet2.com Ltd)* [2020] EWCA Civ 35. Accordingly, what was also protected was also the questions asked and instructions given by the client. That here included the hypothetical question asked by the Prime Minister, and the FTT failed to give sufficient consideration to whether the answer given to that question would have given a clue about, or betrayed the trend of, what the client asked for legal advice about.
26. Fourth, the FTT failed to apply the judgment in *Brown v Bennett (Wasted Costs) (No 2)* [2002] Lloyds Rep. P.N. 242 to the hypothetical question before it. Having quoted from that judgment of Mr Justice Neuberger (as he then was), the FTT failed to apply its critical wording of “*they would inevitably be revealing, albeit to a very limited extent, the contents of their Instructions or their Briefs*” to the hypothetical question before it. The FTT simply left the quote from *Brown v Bennett* stranded at the end of its decision with no reasoned assessment of its application (or lack of application) to the hypothetical question before it.
27. Fifth (and last), the FTT erred in law in not taking a broad approach to legal advice privilege: *Jet2* at [69].
28. It seems to me that there is quite a lot of overlap between these grounds.  
*The Information Commissioner’s arguments*
29. The Information Commissioner seeks to uphold the FTT’s decision on the basis that it applied the correct law and its conclusion was not perverse, and as such there is no proper basis for the Upper Tribunal to disturb its decision. The FTT had made a finding of fact as to the extent to which confirmation or denial would reveal the “contents” of privileged communications, as opposed to the mere fact of their existence.

30. There was little of no dispute between the parties as to the legal principles underpinning legal advice privilege. That privilege protects a confidential communication between a client and his lawyer that is made for the “dominant purpose” of seeking or giving any legal advice or related legal assistance, and is aimed at protecting the content of what passes between a lawyer and their client: *Horton v Kowski* [2025] EWHC 1621 Ch at [53]-[54].
31. However, the mere fact of having sought legal advice would not of and in itself come within section 42(2) of FOIA: see *USP Strategies Plc v London General Holdings Limited* [2004] EWHC 373 Ch at [30] and Passmore on Privilege at section 2-259. As Passmore sets out (at 2-108): “*Something substantive is needed for the privilege to bite on*”.
32. The law therefore distinguishes between:

“[(i)] a case where there is a definite and reasonable foundation in the contents of the document for the suggested inference as to the substance of the legal advice given and [(ii)] merely something which would allow one to wonder or speculate whether legal advice had been obtained and as to the substance of that advice”: *Estera Trust (Jersey) Ltd v Singh, In the matter of Edwardian Group Ltd* [2017] EWHC 2805 (Ch) at [37] (applied in *Horton* at [73]).

This is not, however, a binary test, but rather should be seen as two ends of a spectrum, and where a particular confirmation under section 42(2) of FOIA would cross or fall into the first category is a question of and degree involving the prognostic assessment of the facts.

33. Further by way general submission, the Information Commissioner stressed that the Upper Tribunal’s appellate jurisdiction extends only to errors of law and it should “*hesitate long before interfering with a careful assessment of this nature by a judge experienced in the relevant field, who has correctly directed himself as to the applicable legal principles*”: *Tchenguz v Director of the Serious Fraud Office* [2014] EWCA Civ 136; [2014] 4 All E.R. 627 at [20]. That was a case concerning what the dominant purpose of a communication was. The Information Commissioner even went as far as arguing that such reticence must, in the context of the Upper Tribunal’s jurisdiction, convert to something approaching a bar on interference.
34. The Information Commissioner also argued by way of general submissions that there was an obligation to read the FTT’s reasons benevolently which should preclude the assumption that something which was not expressly referred to had been left out of account. That preclusion applied even more so where something had been expressly referred to and the parties had been left in no doubt about the conclusion which the FTT had reached: per *DPP Law Ltd v 4 Greenberg* [2021] EWCA Civ 672 and *Cranham Sports LLP v HMRC* [2024] UKUT 209 (TCC) On this basis it was argued that the FTT’s answer to the hypothetical question was well within the generous ambit afforded.
35. As to the specific process grounds of appeal, the Information Commissioner sought to answer these as follows.

36. The first ground about the FTT's alleged wrongful interpretation of the request was no more than a challenge to the FTT's factual finding as to the meaning of the request, which properly analysed was an attack on the essential finding of the FTT as to what would be revealed by confirmation or denial. Given what may have definitely and reasonably been inferred from any such confirmation, the linguistic subtleties under this ground were said to be misplaced. The second ground of appeal, that the FTT took too restrictive approach to "substance", was no more than attempt to camouflage a disagreement with a factual finding as an error of approach. The third ground of appeal, which the Information Commissioner characterised as a complaint that the FTT took too restrictive approach to types of communication, was similar to ground two and was not supportable on any proper reading of the FTT's decision. All the FTT did, unobjectionably was to cite the examples from the Information Commissioner's guidance to illustrate the distinction it was applying, and it then applied that distinction to the facts before it. As for ground four, this was no more than an attempt by the Cabinet Office to retrofit an error of approach onto a straightforward finding of fact. Moreover, this ground was particularly ambitious given the FTT expressly quoted the passage from *Brown v Bennett* which it was being argued it had ignored. Finally, the fifth ground, about adopting a broad approach to legal advice privilege, also had no merit. The relevant legal question is the one the FTT in fact asked itself, namely whether there would be any revelation of the content of privileged communications (including clues and trends) as distinct from the mere fact of advice having been sought or given.

#### *Mr Peagram's arguments*

37. Mr Peagram did not attend the hearing. He is not, at least as far as I am aware, a lawyer. In written submissions filed on the appeal Mr Peagram argued that the FTT had not erred in law, there was no privilege involved in answering the hypothetical question and, even if there was, nothing of substance would be revealed. Mr Peagram relied on what said had been revealed in the UK Covid-19 Inquiry about the legal basis for the lockdown restrictions announced on 23 March 2020.
38. Mr Peagram further argued that the FTT had not misunderstood the request. He had assumed advice on lawfulness would encompass "*how lawful and enforceable a decree would be in uncharted territory of attempting house arrest otherwise than by statute*". The meaning of the request was a question of fact for the FTT. Moreover, the Cabinet Office had failed to set out what inference could be drawn as to the content of the advice given in answer to the hypothetical question. In addition, the FTT had in the body of its decision, and at paragraphs 12-3, and 20 and 22, applied the *Brown v Bennet* approach and did not therefore need to repeat this analysis.

#### **Discussion and Conclusion**

39. I start by addressing the Information Commissioner's arguments about the limitations on the Upper Tribunal's jurisdiction. I reject the argument, if it was being made, that the Upper Tribunal in the exercise of its error of law jurisdiction

should, in effect, be barred from interfering with an FTT's decision. The limits of the Upper Tribunal's error of law jurisdiction has recently been addressed by a three-judge panel of this Chamber of the Upper Tribunal in *Information Commissioner v Experian Limited* [2024] UKUT 105 (AAC) at paragraphs [60]-[62]. That decision was based on the Supreme Court's decision in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8; [2024] 3 All ER 93, which discussed challenges on appeal to evaluative judgements. Even in that context, however, the Supreme Court recognised that the appellate court or tribunal is not powerless to intervene. As it was put in paragraph [49] of *Lifestyle Equities*:

"It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in *In re Sprintroom Ltd* [2019] EWCA Civ 932; [2019] BCC 1031, at paras 72–76.... on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion."

40. I accept the Cabinet Office's argument, however, that the case before me in this appeal is somewhat different in that the FTT was dealing with an agreed and particular set out facts, and therefore the evaluative assessment of evidence and fact did not arise, or at least did to arise to the same extent contemplated in *Lifestyle Equities*. This does not mean that deciding if the FTT erred in law it is open to me just to redecide the answer to the hypothetical question. However, it does seem to me to provide the basis for rejecting the Information Commissioner's perhaps novel argument that the Upper Tribunal should treat itself as being barred from interfering with the FTT's decision. I add that I do not find either instructive or helpful the notion of 'approaching' a bar on non-interference, which itself is an elusive concept. If all that is meant by that is the Upper Tribunal must take account of the specialist nature of the FTT's expertise when considering challenges to its evaluative judgements (per paragraph [34] of *DWP v ICO and Zola* [2016] EWCA Civ 758), I would have no difficulty with such a submission. But that did not seem to be the limit of the Information Commissioner's argument on this particular point, and as I have already indicated the extent of evidential evaluative judgement engaged in this case is, at best, limited.
41. Without considering the breadth of legal advice/professional privilege outside FOIA, section 42(1) of FOIA does allow for qualified inroads to be made into that privilege in the context of meeting the need for freedom of information where the information sought would otherwise be immune from disclosure because it is legally privileged: see the very recent discussion on this by the Inner House of the Court of Session in *The Scottish Ministers against The Scottish Information Commissioner* (Court of Session) [2026] CSIH 15. However, by contrast, the duty to confirm or deny whether the information sought is held is removed by section 42(2) of FOIA simply if compliance with

that duty would involve disclosure of any information to which a claim to legal professional (or advice) privilege could be maintained in legal proceedings. No balance of competing interests arises in answering that section 42(2) question. And section 42(2) provides a particular statutory recognition that the mere denial that information is held is itself capable of attracting legal professional/advice privilege.

42. The issue under section 42(2) is thus simply and squarely whether answering whether the information requested is held would involve disclosure of legally privileged information. In other words, the reach of legal advice privilege is the sole issue engaged by section 42(2) of FOIA. I turn, accordingly, to consider legal advice privilege.
43. Legal advice/professional privilege is a jealously guarded and long held right. It was not disputed before me that it applies as much to the person seeking charged with a criminal offence seeking advice about that matter from a lawyer as it does to a person seeking legal advice about the implications of them getting divorced, as well as to the Prime Minister of the United Kingdom seeking legal advice about Government policy. As it has just been put by Lord Malcolm in the *Scottish Ministers* case:

“For centuries the view of the common law has been that the proper administration of justice depends on those who seek legal advice having the assurance that what is said between them and their lawyer will always remain private unless they choose to reveal it. Effective legal advice requires that the adviser be in possession of the full and unvarnished facts, which may not be provided if the client has no guarantee as to the sanctity of their discourse. At common law this absolute assurance extends to material prepared for or in contemplation of litigation.”

44. The rationale for legal advice privilege has also been set out in various English cases. Thus in *R v Derby Magistrates’ Court ex parte B* [1996] AC 487 it was described by the then Lord Chief Justice (at page 507C-D) as being based on the requirement that:

“a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.”

45. Legal professional privilege was described by Lord Hoffmann at paragraph [7] of *R(Morgan Grenfell Ltd) Special Commissioners of Income Tax* [2002] UKHL 21; [2003] AC 563 as:

“...a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.”

46. Similarly, Lord Scott in *Three Rivers Council v The Governor and Company of the Bank of England (No 6)* [2004] UKHL 46; [2005] 1 AC 610 said (at paragraph 34]) that the privilege recognises:

“...that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else...”

47. That then is its rationale, but what about the contours or the extent of legal advice privilege? In other words, what does it cover?
48. The general extent of legal advice privilege may be stated as covering confidential communications between a client and their lawyer in a relevant legal context where those communications are made for the dominant purpose of receiving or giving legal advice. This will include communications that form part of a “continuum” that aims to keep the lawyer and client informed so that legal advice may be given as required. This point was made this way in *Balabel v Air India* [1988] 1 Ch. 317 (at 324 B-D and 332 B-D):

“Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter

from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

By contrast, the formulation adopted by Judge Paul Baker and quoted earlier in this judgment is in my view too restrictive. It suggests that a communication only enjoys privilege if it specifically seeks or conveys advice. If it does so, it is privileged, notwithstanding it may also contain "narratives of facts or other statements which in themselves would not be protected." However, the second half of the judge's formulation implies that all documents recording information or transactions with or without instructions or recording meetings lack C privilege if they do not specifically contain or seek advice.... In my judgment that formulation is too narrow. As indicated, whether such documents are privileged or not must depend on whether they are part of that necessary exchange of information of which the object is the giving of legal advice as and when appropriate."

49. In *R(Jet 2.com Ltd) v Civil Aviation Authority and Law Society* [2020] EWCA Civ 35; [2020] 2 WLR 1215 the contours of legal advice privilege (referred to as 'LAP' in the judgment) were summarised (at para. [69]) as follows:

"(i) Consideration of LAP has to be undertaken on the basis of particular documents, and not simply the brief or role of the relevant lawyer.

(ii) However, where that brief or role is qua lawyer, because "legal advice" includes advice on the application of the law and the consideration of particular circumstances from a legal point of view, and a broad approach is also taken to "continuum of communications", most communications to and from the client are likely to be set in a legal context and are likely to be privileged. Nevertheless, a particular communication may not be so—it may step outside the usual brief or role.

(iii) Similarly, where the usual brief or role is not qua lawyer but (eg) as a commercial person, a particular document may still fall within the scope of LAP if it is specifically in a legal context and therefore, again, falls outside the usual brief or role.

(iv) In considering whether a document is covered by LAP, the breadth of the concepts of legal advice and continuum of communications must be taken into account.

(v) Although of course the context will be important, the court is unlikely to be persuaded by fine arguments as to whether a particular document or communication does fall outside legal advice, particularly as the legal and non-legal might be so intermingled that distinguishing the two and severance are for practical purposes impossible and it can be properly said that the dominant purpose of the document as a whole is giving or seeking legal advice.

(vi) Where there is no such intermingling, and the legal and non-legal can be identified, then the document or communication can be severed: the parts covered by LAP will be non-disclosable (and redactable), and the rest will be disclosable...

(vii) A communication to a lawyer may be covered by the privilege even if express legal advice is not sought: it is open to a client to keep his lawyer acquainted with the circumstances of a matter on the basis that the lawyer will provide legal advice as and when he considers it appropriate."

50. The two key takeaways from this summary are probably:
- (i) that legal advice privilege and the continuum of communications must be applied broadly and not restrictively or on a nit-picking basis (*Jet2* at [65]). And that broad approach is founded on the rationale of allowing a client and their lawyer to be unencumbered in the exchange of information when advice is being sought and given; and
  - (ii) the continuum covers the request or instructions to the lawyer seeking advice as well as the advice given.
51. However, legal advice privilege does not attach just to the actual communications or documents communicated between the client and their lawyer. It will also cover evidence about the content of those communications or documents: see *Three Rivers v The Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474; [2003] QB 1556 at paragraphs [19]-[21] and *In the matter of Edwardian Group Limited* [2017] EWHC 2805 (Ch) at paragraph [28]. Allied with this is what is referred to as the inference principle. This extends legal advice privilege to documents from which the substance of the legal advice given to a client could be inferred. Such an inference need not be precise or granular as documents which “give a clue” as to the legal advice given or which betray “the trend of the legal advice” will also be privileged: per *In the matter of Edwardian Group Limited* (at paragraphs [34] and [39]) and *In re RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch); [2017] 1 WLR 1 WLR 1991 at paras. [1001]-[102]. However, *In the matter of Edwardian Group Limited* makes clear (at para. [36], and following *AWB v Terence Cole* [2006] FCA 571 that:
- “the inference of fact to be drawn “must have a definite and reasonable foundation in the contents of the document” and that it was not enough if there was something in the document which would cause the reader “to wonder or speculate whether legal advice had been obtained and what was the substance of that advice.”
- It is the Cabinet Office’s case that that definite and reasonable foundation was met here, on the hypothetical question, because the Prime Minister was seeking advice as to the lawfulness of the particular lockdown announced on 23 March 2020. It was those particular set of measures about which advice was being sought as to whether it was lawful to introduce them. And providing an answer to a (here, hypothetical) question can also attract the privilege: see, if necessary, *Brown v Bennett* at pages 327-329.
52. I need touch on only one more matter arising from the case law. This concerns the passage at paragraph 2-259 from Passmore on Privilege that:

“References to the obtaining of legal advice on a given subject matter are not privileged (albeit references which evidence the content of that advice are prima facie privileged).”

53. The footnote to this passage in Passmore suggests it is based on subparagraph (b) in paragraph [30] of the *USP Strategies* case [2004] EWHC 373 (Ch). That paragraph reads as follows:
- “30. Those conclusions can be summarised in relation to the redactions which have been made in the Defendants’ disclosed documents is as follows:  
(a) References to the mere obtaining of legal advice are not privileged.  
(b) References to the obtaining of legal advice on a given subject matter are not privileged.  
(c) Level 3 references, which evidence the content of that advice, are *prima facie* privileged.”
54. It is the passage before the brackets in paragraph 2-259 in Passmore that was raised in argument before me. If all this passage means is that the mere fact of having sought legal advice would not in and itself attract the protection of section 42(2) of FOIA, it was accepted before me that such a statement would be correct as a matter of law. However, I accept that all that paragraph [30] in *USP Strategies* was dealing with was the application of the law to the facts in that case (as shown by the heading above paragraph [27] of that judgment) and was not deciding any issues of legal principle.
55. Accordingly, in my judgement Passmore is wrong in the unbracketed part of its paragraph 2-259 in stating in general terms that all references to the obtaining of legal advice on a given subject matter are not privileged. Paragraph [30] of *USP Strategies* is not authority for that being a proposition of law, as both the Cabinet Office and the Information Commissioner agreed before me.
56. Applying these principles concerning legal advice privilege to the appeal before me, I am satisfied the FTT erred in law in its decision and that its decision should be set aside as a result.
57. In essence, in my judgement the FTT erred law in failing to place any adequate weight on the need to take a broad approach to what may constitute legal advice privilege and failed to reason out adequately why answering the hypothetical question would not reveal information to which legal professional/advice privilege applied.
58. My starting point, accepting the Cabinet Office’s argument to this effect, is that *prima facie* (or at least strongly arguably) the hypothetical question – namely whether the Prime Minister sought legal advice on the lawfulness of the lockdown announced on 23 March 2020 – was, applying the broad protection afforded by legal advice privilege, one which was a sufficiently specific request for legal advice as to attract legal advice privilege. This is not, I consider, my redeciding the issue which was before the FTT, but is rather an appropriate means of my testing the legal adequacy of the FTT’s decision. As I have accepted in paragraph 40 above, this is not a case in which evidence required evaluating by the FTT and therefore deferring to that evaluative expertise either does not arise or does not arise to any significant extent.
59. I accept, as was agreed by the parties before me at the oral hearing, that the mere confirmation that legal advice was sought would not be covered by legal

advice privilege. A well-known person who has sought advice from a lawyer about separating from their partner and who is spotted by a journalist leaving a solicitors firm would not, without more, be able to invoke legal advice privilege if simply asked if he had been getting legal advice from the solicitor. However, if the journalist asked if that person had been asking for advice about separating legally from their civil partner or spouse, it seems to me that they would be entitled to give no answer to that question relying on legal advice privilege.

60. In my judgement the first legal misstep in the FTT's approach to the issue before it occurred in paragraph 12 of its decision where it seemed to exclude from its consideration on the issue before it the terms of any request for advice. It may be in fairness that by this the FTT only meant the detailed terms of any instructions outwith a request for legal advice about the lawfulness of the lockdown announced on 23 March 2020: see the first two sentences in paragraph 23 of the FTT's decision. However, the position is unclear, and when read with paragraphs 23, 27 and 31 of its decision it does seem to me that the FTT took too narrow an approach to the protection afforded by legal advice privilege, which as I have said above is all that section 42(2) is concerned with.
61. In paragraph 23 of the decision the FTT drew what it saw as an important distinction between the fact of a request for advice on a topic having happened and the instructions which go to the provision of legal advice. However, this distinction leaves out of account whether the topic on which advice was sought of itself reveals, by inference or otherwise, the nature or substance of the advice sought and then given. This omission is repeated by the FTT in paragraph 27 of its decision where it directed itself that "*knowing the fact that someone has asked for advice about a proposed action reveals nothing of the substance of that advice*". Again, this will depend on what proposed action the advice was being sought. Take the divorce example given above. Seeking confidential advice from a lawyer about the topic of getting divorced from one's spouse must classically fall within legal professional privilege. Likewise, paragraph 31 of the FTT's decision and the view there expressed that confirmation that advice has been sought "*on a topic tells you nothing substantive about the communication between the client and their lawyer*". This adopts in my judgement too narrow an approach, and to the extent that the FTT was in either paragraph 27 or 31 relying (unstated) on paragraph 2-259 of Passmore and paragraph [30] of USP Strategies, it was wrong to do so for the reasons I have given above.
62. It is a too narrow approach which led the FTT, wrongly in my judgement, in the very next paragraph of its decision to state that the terms of the request were clear because "*it asks whether the Prime Minister sought advice and that is the hypothesis on which we are asked to proceed*" and (also per paragraph 32 of the FTT's decision) "*whether the duty to confirm or deny applies these facts as agreed*". I accept that FTT's reasons have to be read as a whole and benevolently, but even so doing, in my judgement the FTT misdirected itself, at least at that stage in its reasoning, as to the issue it had to decide. The issue was not simply whether the Prime Minister had sought advice about what to say in his television address on 23 March 2020 or advice on the lockdown he announced that day. If that was the topic or topics on which the Prime Minister (hypothetically) sought advice, the mere fact he had done so may not have been

privileged. That, however, was not the whole extent of the hypothetical question which the FTT was being asked to answer.

63. Discounting this paragraph 32 of the FTT's decision as its dispositive reasoning, leaves the kernel of the FTT's reasoning in paragraph 26. I agree with the Cabinet Office that the FTT's accurate recitation and description as to what *Brown v Bennett* decided at the very end of its decision adds nothing to explain the FTT's reasons for its decision that section 42(2) was not engaged by the hypothetical question. And paragraph 33 of the FTT's decision is really no more than a statement about what section 42(2) of FOIA is about in general terms.
64. Paragraph 26 of the FTT's decision characterises the request as asking whether legal advice had been sought about what the Prime Minister was to say in his speech on 23 March 2020. Although I do not consider I need to decide separately whether this was a legally erroneous construction of the request, it is at least unfortunate that the focus here is not on the terms of the hypothetical question it had been agreed should be decided by the FTT as a preliminary issue. The hypothetical legal advice was not asking for advice as to the script the Prime Minister was to use in his television address. The hypothetical question's focus was on whether the Prime Minister had sought advice on the lawfulness of the lockdown of 23 March 2020.
65. The crucial reasoning of the FTT in respect of that question is that the word 'lawfulness' added nothing to the meaning of that request. Again, in my judgement that was to take too restrictive an approach in considering a claimed right to legal advice privilege. It discounts that advice may be sought on matters going beyond whether an action is, or proposed measures are, lawful: see, for example, *Balabel*. It follows that seeking advice from a lawyer need not always be about the lawfulness of an action or measure and so the addition of the word 'lawfulness' is not otiose. In any event, in my judgement the FTT failed to consider the hypothetical question as a whole. It was seeking advice about the lawfulness of the particular Covid-19 lockdown announced on 23 March 2020. That lockdown restricted all people in their UK to their homes or where they were living as at that date, subject to some exceptions. Whether that lockdown and the package of measures put in place to make it effective were lawful plainly in my judgement coloured what the advice was seeking. And advice given as to whether the lockdown measures were lawful, that is within the Government's legal powers, would 'give a clue' as to the content of the advice provided. All that is required, per *Brown v Bennett*, and bearing in mind the need to construe the legal advice privilege broadly, is whether disclosure would reveal to a (very) limited extent the content of the instructions or the advice. The potential for even such limited disclosure must be jealously guarded against in the furtherance of the privilege.
66. The above is sufficient for me to conclude that the FTT erred materially in law in its decision of 21 August 2023. I have not found it necessary in arriving at my decision to track through each of the five grounds relied on by the Cabinet Office, but the grounds on which I allow this appeal coincide with a number of the arguments which the Cabinet Office made before me.

67. All parties have agreed that if this stage were to be reached, with the FTT's decision being set aside for being in error of law, I should redecide the preliminary issue which was before the FTT based on the parties written arguments to the FTT on that issue.
68. I have taken into account all of those written arguments. In my judgement, the correct answer to the hypothetical question posed in that preliminary issue is that answering whether or not the Prime Minister had (on the hypothesis) sought legal advice on the lawfulness of lockdown announced on 23 March 2020, would have revealed information to which legal advice privilege applied. I can provide my reasons for this conclusion in short form as they have largely been foreshadowed above. Taking due account of the need to construe the protection afforded by legal advice privilege broadly, in my judgement to confirm whether the Prime Minister made a request for advice about the lawfulness of the lockdown announced on 23 March 2020 would to an extent reveal privileged information. The request was about the legality of the measures imposed by the lockdown of 23 March 2020. In other words, whether those particular measures (e.g., requiring people to stay at home or in wherever they were living on 23 March 2020, subject to certain exceptions) fell within the Government's legal powers. Asking that particular question about the lawfulness of those particular measures was part of confidential communications between the Prime Minister and his lawyers on that issue, and to an extent would have revealed or given a clue as to the what the advice was about, namely whether the lockdown measures were lawfully authorised.

**Stewart Wright**  
**Judge of the Upper Tribunal**

Authorised for issue on 31 March 2026