IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2013/0087
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision Notice No: FS50406024, dated 26 March 2013

Appellant:	DEPARTMENT OF HEALTH
Respondent:	INFORMATION COMMISSIONER

Heard at:	Fleetbank House, London EC4
Date of hearing:	18-19 November 2013
Date of decision:	17 March 2014

Before

Andrew Bartlett QC (Judge)
Alison Lowton
John Randall

Attendances:

For the Appellant:	James Eadie QC and Ivan Hare (counsel)
For the Respondent:	Robin Hopkins (counsel)

Subject matter:
Freedom of Information Act 2000 – qualified exemptions – formulation or development of government policy – Ministerial communications – operation of Ministerial private office – public interest balance
Freedom of Information Act 2000 – Tribunal's powers – public interest balance - value of oral evidence – extent of deference to Government evidence – weighing the benefits and detriments of disclosure – aggregation of exemptions – use of parliamentary materials
Freedom of Information Act 2000 – whether information held

Cases:
APPGER v IC and FCO EA/2011/0049-0051, 3 May 2012
APPGER v IC and FCO [2013] UKUT 560 (AAC)
Browning v IC and DBIS [2013] UKUT 236 (AAC)
Conway v Rimmer [1968] AC 910
Department of Health and Social Security and Public Safety v IC EA/2013/0081, 13 November 2013
Evans v IC [2012] UKUT 313 (AAC)
Foreign and Commonwealth Office v IC and Plowden [2013] UKUT 275 (AAC)
Foreign and Commonwealth Office v Inner North London Coroner [2013] EWHC 3724 (Admin)
Guardian Newspapers Ltd and Brooke v IC and BBC EA/2006/0011 and 0013, 4 January 2007
International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158, [2003] QB 728
Home Office and MoJ v IC [2009] EWHC 1611 (Admin)
Office of Communications v IC [2009] EWCA Civ 90
Office of Communications v IC [2010] UKSC 3
Office of Communications v IC Case C-71/10, [2011] 2 Info LR 1, [2012] CMLR 7
Office of Government Commerce v IC [2008] EWHC 774 (Admin), [2010] QB 98
R (Age UK) v Secretary of State for Business, Innovation and Skills [2009] EWHC 2336 (Admin), [2010] ICR 260
R (Evans) v Attorney General [2013] EWHC 1960 (Admin)
R (Evans) v Attorney General [2014] EWCA Civ 254
R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2009] EWHC 2549 (Admin)
R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2010] EWCA Civ 65, [2011] QB 218
Scotland Office v IC EA/2007/0128, 5 August 2008
Toussaint v Attorney General of Saint Vincent and the Grenadines [2007] UKPC 48, [2007] 1 WLR 2825
University of Newcastle upon Tyne v IC and BUAV [2011] UKUT 185 (AAC), [2011] 2 Info LR 54

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal except as follows:

The Department is not required to disclose the diary entries agreed between the Department and the Information Commissioner to be protected from disclosure as set out in paragraphs 20-21 of the Tribunal's reasons.

SUBSTITUTED DECISION NOTICE

The Substituted Decision

The Commissioner's Decision Notice stands, except as follows:
(A) The Commissioner accepts that FOIA s35(1)(a), (b) and (d) are respectively applicable to the diary entries for which they have been claimed by the Department of Health.
(B) The Commissioner accepts that the substance of the diary entry of 14 March 2011 at 1600 is exempt from disclosure by reason of FOIA s35 and the public interest balance being against disclosure of that entry.
(C) The Commissioner accepts that the substance of certain further diary entries as referred to in paragraphs 20-21 of the Tribunal's reasons is exempt from disclosure by reason of FOIA s40(2).

Action Required

With the exception of the entries referred to in (B) and (C) above, the Department of Health is required to disclose the withheld information as previously ordered by the Commissioner, within 28 days.

REASONS FOR DECISION

Introduction

1. This appeal is concerned with the Ministerial diary of the Rt Hon Andrew Lansley CBE MP for the period 12 May 2010 to 30 April 2011, during which time he was Secretary of State for Health. This is the first time that judicial consideration has been given to the disclosure of a Ministerial diary under the Freedom of Information Act ('FOIA').

2. It involves important issues as to the Tribunal's approach to assessment of evidence adduced by a central government department and as to how the Tribunal should undertake the task of assessing the balance of public interest, which are considered in paragraphs 32-64 below. These are (1) the value of oral evidence, (2) the extent of deference to Government evidence and the analogy with PII, (3) weighing the benefits and detriments, (4) aggregation of exemptions, and (5) use of parliamentary materials.

The request and the complaint to the Information Commissioner

3. The information request was made by a journalist in the health sector, Mr Simon Lewis, to the Department of Health ('the Department') on 8 June 2011. Its full terms are set out in the Information Commissioner's Decision Notice. The Department refused the request initially and on internal review, citing various exemptions. The requester complained to the Commissioner.

4. During the course of the Commissioner's investigation, about August/September 2012, the Department disclosed a copy of the diary to the requester with significant redactions made in reliance on FOIA ss21, 23, 24, 27, 35(1)(a) and (d), 36, 38, 40(2), 41 and 44. The Department also maintained that some of the information in the diary was outside the scope of the request. The specific rationale for the considerable disclosure made by the Department during the Commissioner's investigation was unclear.[1]

5. The Commissioner decided:

   a. All of the information within the diary was within the scope of the request.

   b. Section 23 (security bodies) was correctly applied to six diary entries.

   c. Section 40(2) (personal data) was correctly applied to certain named individuals and information about them in the diary, but did not apply to

[1] The Commissioner's telephone note of 16 August 2012, recording the change of the Department's position, contains no reasoning offered by the Department.

the names of local MPs. Any information which might be covered by ss38, 41 and 44 was exempted in any event by s40(2).

d. On the evidence, the Department was not entitled to rely on ss21, 24, 27, 35(1)(a) or 36.

e. Section 35(1)(d) (operation of Ministerial private office) was engaged, but the balance of public interest was in favour of disclosure.

6. He ordered the Department (i) to disclose or issue a valid refusal notice in respect of the information which the Department had treated as outside the scope of the request, and otherwise (ii) to disclose the withheld information apart from that redacted under s23 and/or s40(2).

The appeal to the Tribunal

7. The Department appealed against the decision. The requester was notified of the appeal but did not wish to become a party to it.

8. During the course of the appeal both parties refined their positions in a number of respects. In the case of the Department, this was because the whole matter was reconsidered in light of the Commissioner's decision. In the case of the Commissioner, this was pursuant to his standard practice of reviewing his position in the light of additional evidence and explanations. As a result, the questions which were addressed at the hearing were:

a. whether entries relating to non-Ministerial activities (eg, private engagements or constituency or party work) constituted information held by the Department for the purposes of FOIA,

b. whether the Department can rely on a 'neither confirm nor deny' analysis in relation to certain entries falling under s23 or 24 (security matters),

c. the application of s35(1)(a), (b) and (d) (formulation of government policy, etc) and the public interest balance,

d. whether the Department can rely on s36,

e. the extent of the proper application of ss40(2) (personal data) and 41(1) (information provided in confidence).

Evidence

9. In addition to the basic documentation consisting of the request and the responses to it, the evidence before us initially consisted of the following:

   a. the diary itself, and the redacted version of it that was ultimately made available to the requester[2];

   b. a witness statement of Sir Alex Allan, a distinguished former civil servant, currently the Prime Minister's Independent Adviser on Ministerial Interests;

   c. an open and a closed witness statement of Paul Macnaught, the Director of Assurance at the Department (the only difference between the open and closed versions of his statement being that the latter included reference to specific examples in the diary of points that he was making in his open evidence);

   d. some joint answers of Sir Alex and Mr Macnaught to written questions put to them on behalf of the Commissioner.

10. The parties had envisaged that the hearing would take place on the above evidence alone. We requested and were provided with the principal items of correspondence between the Commissioner and the Department, and we also requested that Sir Alex and Mr Macnaught attend to give oral evidence, which they did on the second day of the hearing. Sir Alex was questioned in open session and Mr Macnaught in closed session.[3] The oral evidence materially influenced our assessment of the written evidence, as we set out below in the part of our decision dealing with s35. In the event we had some concerns about their evidence, which we mention below where relevant. The Department also produced to us some parliamentary material which was referred to in Sir Alex's written statement.

11. The Commissioner's acceptance that the hearing should take place on written evidence alone arose in part in response to a note appended to a directions decision given by Judge Warren on 14 August 2013, which stated:

> It should not be assumed that cross-examination is necessary. Cross examination will be permitted only in so far as it assists the Tribunal to deal with the case fairly and justly. If the Respondent wishes to ask questions of the Appellant's witnesses then so far as possible the questions should be asked and answered in advance and in writing.

[2] We give further description of the diary entries in paragraph 65 below.

[3] The requester was not present or represented at the appeal hearing, and the active opposition to the appeal was from the Commissioner. Where things were said by Mr Macnaught in closed session which bear materially on our decision, and which could have been said in open session, they are mentioned by us in this open judgment.

12. It seems to us that Judge Warren's note was not intended effectively to prevent cross-examination in the present case, but was, rather, a general caution against unnecessary cross-examination.

13. Mr Hopkins informed us that the Commissioner's approach to the question whether there should be oral evidence was also influenced by judicial remarks which were made in the course of the hearing in *APPGER v IC and FCO* [2013] UKUT 560 (AAC), and which were ultimately reflected in the published decision at [148][4]. We refer to this again below, under the heading 'The balance of public interest: our approach to the evidence'.

14. We deal first with the question of scope, and with the less controversial exemptions, before addressing the main disagreement between the parties which arises on the impact of s35. We consider s36 at the end, since the Department only relies on this contingently, in the alternative to s35.

Entries relating to non-Ministerial activities

15. A number of entries in the diary relate to non-Ministerial activities, such as private engagements or constituency or party work. The Department agrees that when the entries were made the date and time of the appointment were held by the Department within the meaning of FOIA s3(2), because they were made for the purpose of avoiding conflicting Ministerial appointments. However, the Department argues that at the date of the request these entries were no longer 'held' by the Department, which was merely providing electronic storage facilities for the information.[5] The Commissioner contends that this is an artificial description, and that the Department held all the information and did not cease to hold it. It is common ground that we should understand s3(2) in the sense explained in *University of Newcastle upon Tyne v IC and BUAV* [2011] UKUT 185 (AAC), [2011] 2 Info LR 54.

16. We accept the Commissioner's contention. The Department's case seems to us to be unrealistically absolute. There is no evidence of the existence or purpose of any request by the Minister to the Department to provide electronic storage facilities for information which is of no relevance to the Department. The details of the engagement, beyond the mere date and time, may be useful to the Department in the event of an urgent need to contact the Minister. Of course, the primary usefulness of diary entries is in the period leading up to the booked time. Afterwards, they are of much less use. But (for example) there is always the possibility that a query may arise over the Minister's activities, and the Minister's private secretary may wish to check where the Minister was at a particular time. In such a circumstance, the Department would refer to the diary which it holds. We are unable to accept that the Department's holding of the information in the non-Ministerial entries automatically ceases upon the fulfilling of each personal or political engagement referred to. It seems to us that the only reason that the information is held by the Department at all is that it is originally gathered for

[4] The decision of the Upper Tribunal became available in the course of 18 November, which was the first day of the hearing of the present appeal before us.

[5] The particular entries to which this applies are defined in paragraphs 14 and 18 of the Department's written submissions dated 4 October 2013.

the Department's purposes; it simply continues to be held by the Department even after the passing of the dates of the engagements.

17. Whether this has any practical impact in terms of disclosure depends upon the application of exemptions. The Commissioner accepts that s40(2) protects the entries made concerning annual leave and other personal data.[6] Other entries require consideration under s35; as regards these, the Commissioner concedes that the non-Ministerial nature of the engagements must be taken into account in assessing the public interest balance. On 28 January 2013 the Tribunal sent to the parties a draft of its decision, with an inquiry whether in the light of the findings any further order was required in relation to the information which the Department had classified as not held. None was requested by either party.

Personal data and information provided in confidence

18. The Commissioner generally agreed with the Department's application of the s40(2) exemption for personal data prior to the appeal, save as regards references to constituency MPs meeting with the Minister as part of their duties as elected representatives. The Commissioner contends that the expectation of privacy when meeting the Secretary of State was lower for MPs than for others, and that any detrimental consequences of intrusion on privacy attracted less weight in their case. Accordingly, the Commissioner contends that disclosure is permissible, having regard to the Data Protection Act 1998 Schedule 1 Part I paragraph 1 and Schedule 2 paragraph 6, and the relevant public interest considerations. Without making any formal concession, at the hearing Mr Eadie QC accepted the existence of the differences identified by the Commissioner and did not actively seek to persuade us that the Commissioner's analysis was inappropriate. We accept the Commissioner's contention. The diary entries relating to constituency MPs are disclosable unless another exemption applies to them.

19. The Commissioner emphasizes in his written argument that his agreement to the application of s40(2) means only that the names and any other identifying information must be redacted, rather than the full diary entry. We do not understand the Department to contend to the contrary, and we agree with the Commissioner's approach, subject to the application of any other exemptions to particular entries.

20. At the appeal the Department relied additionally on s40(2) in relation to entries of 19 July 2010 at 1500, 25 August 2010 at 1100 and 14 March 2011 at 1600. We need not consider the first two of these, because the Commissioner accepts the application of s40(2) to them. It is not necessary for us to rule on the third, because the Commissioner accepts that the entry is exempt under s35 and because of its particular nature the balance of public interest is against disclosure.

21. Following receipt of the Tribunal's draft decision on 28 January 2013 the parties were able to review the application of s40(2) to the diary, and agreed

[6] Ie, as described in paragraph 20 of the Department's written submissions dated 4 October 2013.

that there were a number of additional entries where that exemption protected personal details from disclosure. These were identified in a letter from the Treasury Solicitor, on behalf of the Department, dated 21 February 2014 and an email in response from the Commissioner, dated 10 March 2014.

22. Because of the position as set out above, it is not necessary for us to consider the application of s41. Nor is it necessary for us to give separate consideration to any question of public interest balance under those parts of s40(2) which do not constitute absolute exemptions.

The security exemptions: ss23(5) and 24(2)

23. Some entries were withheld in reliance on s23(1); this reliance was accepted in the Decision Notice and is not in issue on the appeal.

24. The Department now takes a 'neither confirm nor deny' ('NCND') position on a small number of other entries, relying on a combination of s24(2) and 23(5). Section 23 is an absolute exemption; s24 is not. The Commissioner contends that the NCND analysis is not appropriate, but accepts that the entries may properly be withheld. The Department submits that there is nothing which we need to decide on this aspect for the purpose of disposing of the appeal.

25. We accept the Department's submission. The Department admits that it holds the Minister's diary. The Commissioner accepts that the entries in question may properly be withheld, and has not insisted that the Department serve on the requester a refusal notice distinguishing, in relation to these particular entries, between s23 and s24. Accordingly, in the particular circumstances the difference between the parties on this issue seems to us to be a sterile debate and we do not consider that there is any practical issue for us to resolve. Moreover, since the entries are to be withheld, there is no need for us to consider any question of the interrelation of the public interest under s24 with the public interest in maintaining other exemptions.

Application of s35(1)(a), (b) and (d)

26. Section 35 provides:

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

(d) the operation of any Ministerial private office.

27. The proper application of these exemptions depends upon the nature of the connection intended by the use of the statutory phrase 'relates to'. The Department referred us to the discussion of this phrase in the context of FOIA s23 by a First-tier Tribunal (of which Mr Randall was a member) in *APPGER v IC and FCO* EA/2011/0049-0051, 3 May 2012, at [62], [64]-[65], [67]-[68].[7]

28. The phrase 'relates to', read literally, is capable of indicating a very remote relationship. But in s35, as in s23, the function of the phrase 'relates to ...' is to demarcate the boundary of a FOIA exemption. It is clear, therefore, that it should not be read with uncritical literalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context.

29. In *APPGER* [2012] at [68] the First-tier Tribunal decided that in s23 the phrase 'relates to' was directed to the contents of the information – what the information was about; a less direct relationship would not qualify. While s35 differs from s23, we consider that this conclusion is equally applicable to s35. A merely incidental connection between the information and a matter specified in a sub-paragraph of s35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph. It follows, in our view, that the mere fact that information is held in or collated by a Minister's private office does not of itself lead to the conclusion that the information 'relates to' the operation of the Minister's private office within the meaning of s35(1)(d).

30. However, where one of the operational responsibilities of the Minister's private office is to maintain a diary and manage the Minister's engagements, the information contained in the diary will tend to fall within the s35(1)(d) exemption. Whatever exceptions there might be to this general factual conclusion, the Commissioner did not dispute the application of s35(1)(d) by the Department in this case, and we therefore proceed on that basis.

31. Each of s35(1)(a) and s35(1)(b) is relied upon, separately or in combination, in relation to a large number of entries in the diary. The Commissioner's reservations about the engagement of these two exemptions as set out by the Department in this case melted away in light of the evidence adduced by the Department for the appeal. In the event, we are not required to make any decision about the engagement of s35(1)(a), (b) or (d).

[7] This aspect has not so far been considered on the appeal from that decision to the Upper Tribunal: see *APPGER v IC and FCO* [2013] UKUT 560 (AAC) at [2], [45].

The balance of public interest: our approach to the evidence and to the assessment of the balance

(1) Value of oral evidence

32. We have set out above the nature of the evidence adduced before us. In *APPGER v IC and FCO* [2013] UKUT 560 (AAC) at [148] the Upper Tribunal highlighted the need to consider in any particular case whether, in order to provide an appropriate and sufficient process for evaluating the public interest factors, there should be only documentary evidence and argument or whether there should also be oral evidence and cross-examination in open and/or closed session. As with Judge Warren's note to which we have referred above, this does not ban cross-examination but draws attention to a pertinent procedural question. As the Upper Tribunal stated at [144], an approach that 'one process fits all' is not appropriate. A tribunal which addresses this question in order to give procedural directions will wish to keep in mind the power under rule 15(2)(a) of our procedural rules[8] to admit evidence whether or not it would be admissible in a civil trial in the United Kingdom, together with the matters set out in rule 2(2).

33. In most civil litigation it is understood that, if the facts stated by a witness are not challenged in cross-examination, they are taken to be accepted by the opposing party. This rule of practice does not have automatic application in the Tribunal. The Tribunal often allows facts to be challenged by submissions or by other evidence. The Tribunal is unlikely to insist that a requester who is not legally represented cross-examines the public authority's witnesses. But though cross-examination may not be essential, it can still help the Tribunal. The experience of the First-tier Tribunal has been that, where there are witnesses whose evidence goes to the application of exemptions or to the balance of public interest, oral evidence and cross-examination can often be of considerable assistance to the Tribunal in reaching its decision because it materially alters, whether for better or for worse, the strength of the public authority's written case. The usefulness of cross-examination will of course depend upon the nature of the issues. In a case like the present, where the issues involve a difficult judgment on a balance of public interest, which includes assessing the nature, degree and likelihood of future harm, it will often be important for the Commissioner (and, if participating, the requester) to have the opportunity to test the public authority's evidence in cross-examination. Written questions may be of limited usefulness for this purpose, since they provide little or no opportunity for follow-up questions and are generally suited to eliciting answers only on specific points of detail where clarification is required.

34. We would add that an opportunity to put questions to the relevant witnesses can be of special value in cases where there is closed evidence from the public authority in support of claimed exemptions. Since the requester, even when a party to the appeal, will not normally be present or represented in closed session (see *Browning v IC and DBIS* [2013] UKUT 236 (AAC)) such questions must perforce be put by the representative of the Commissioner or by the Tribunal. In the absence of such questions, a requester may understandably feel aggrieved if he is denied access to information on the

[8] The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended.

basis of evidence that he has not been able to see and which has not been independently tested.

(2) Extent of deference to Government evidence and the analogy with PII

35. There is a dispute between the parties over the approach that we should take to assessing the witness evidence. Mr Eadie's submissions at the hearing included that the Tribunal's approach should be the same as the approach of a Court dealing with an issue of public interest immunity ('PII'). We therefore requested from him a written note summarising the current approach to PII claims. This was subsequently supplied, and Mr Hopkins responded on behalf of the Commissioner in a note dated 11 December 2013.

36. Mr Eadie's written and oral submissions can be summarised as follows:

    a. The Tribunal's expertise on freedom of information matters is limited in areas which are particularly within the experience of executive government. In such areas it has to rely more on the evidence and less on its own experience.

    b. The Tribunal's approach should be the same as the approach of a Court dealing with an issue of PII. This involves attaching 'proper weight to the expert and experienced view' of government witnesses. This approach is not confined to PII or to claims relating to security matters or foreign affairs but arises wherever courts or tribunals are required to determine the weight to be attached to judgements formed by those with expertise and experience in the particular area of governmental policy or practice concerned. The basic principle is one of institutional competence – ie, which arm of the State is better able to make the primary decision about the matter in question.

    c. The Commissioner and the Tribunal have no experience of dealing with requests for Ministerial diaries and must rely in this case on the evidence of the Department's witnesses, who have great experience and expertise in relation to central government policy formulation, Ministerial communications, and the operation of a Ministerial private office. In the present case this evidence is not contradicted by any other evidence.

37. In support of these submissions he refers to *Foreign and Commonwealth Office v IC and Plowden* [2013] UKUT 275 (AAC), [13], *APPGER v IC and FCO* [2013] UKUT 560 (AAC), in particular at [75]-[76], [148]-[149], *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] EWHC 2549 (Admin) at [63]-[66], *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65, [2011] QB 218 at [131]-[135], [142]-[153], [187], and *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728, at [74]-[87], especially [85]-[87]. Examination of these references suggests that by 'attaching proper weight' to the views of Government, Mr Eadie might mean showing a high degree of deference to them. The approach of the Divisional Court in *R (Mohamed)* was that the

Foreign Secretary's assessment of the balance of harm to the public interest by disclosure was only open to question by the court if there was no evidential basis for his assessment or there was evidence of a lack of good faith on his part: see, for example, the judgment of 19 November 2009 at [67]-[68]. In the Court of Appeal it was said that the court should not substitute any view of its own of the existence or seriousness of a risk to national security arising from disclosure unless persuaded that there was no proper basis for the view expressed by the Foreign Secretary: see the judgment of 10 February 2010 at [262].

38. On behalf of the Commissioner Mr Hopkins agrees that the Tribunal should attach 'proper weight' to the expert and experienced view of government witnesses, but not in the sense apparently meant by Mr Eadie. He disputes that the Tribunal is required to follow the same approach as on a PII claim or, in particular, to show in the present case the same degree of deference to the views of the Government as a court would show in a case involving security matters or international relations. The cases cited on behalf of the Department are not in point. He says the present appeal is concerned with the different subject matter of s35, 'in which the Tribunal is very experienced – including as regards the consideration of evidence from very experienced civil servants'. The Tribunal is entitled to examine government evidence critically and is not obliged to accept it, even where no evidence is called by the Commissioner: see *Office of Government Commerce v IC* [2008] EWHC 774 (Admin), [2010] QB 98, at [102], Stanley Burnton J. This approach accords with the wide extent of the Tribunal's powers under FOIA s58.

39. Mr Eadie is right to observe that in *APPGER* [2013] at [75]-[76] and [149] the Upper Tribunal explicitly equated the evaluation of competing public interests by the First-tier Tribunal under FOIA with the approach taken by the courts when dealing with PII claims. However, we consider that Mr Eadie interprets this equation too broadly. The equation made by the Upper Tribunal relates to the requirement, common to PII claims and to FOIA proceedings, that care be taken to ensure that the competing factors are properly and sufficiently identified, with consideration of the particular benefits or detriments (and their likelihood) on each side of the balance. This is an important point, but a specific one, and is a far cry from equating PII claims and FOIA proceedings generally.

40. The Upper Tribunal did not say, and in our view cannot have meant, that the exercise to be undertaken by the Tribunal under FOIA was to be equated in all respects with the exercise undertaken by a court considering a PII claim. Such a broad equation would unjustifiably ignore the considerable conceptual and jurisdictional differences:

    a. A PII claim is typically made and tested in circumstances where particular documents or information are prima facie disclosable to a party in criminal or civil litigation (including judicial review proceedings)[9]. The question is whether, in view of potential harm to the public interest, disclosure should be made for the purposes of that litigation. The question may be raised by a party to the litigation or (as in *Conway v Rimmer* [1968] AC 910) by a

[9] A PII claim may also arise in the context of a Coroner's inquest, as in *Foreign and Commonwealth Office v Inner North London Coroner* [2013] EWHC 3724 (Admin).

Government department which is not a party. The relevant jurisdiction of the court in such litigation is a jurisdiction to administer justice between the parties or between the citizen and the State. The competing interests are the public interest in the due administration of public justice and the particular public interest (whether related to national security or otherwise) in maintaining the confidentiality of the disclosable documents for which PII is claimed.

b. In *Browning v IC and DBIS* [2013] UKUT 236 (AAC) at [54]-[71] the Upper Tribunal explained the nature of the FOIA jurisdiction and the very considerable differences between that jurisdiction and ordinary litigation in the courts. An information tribunal is not administering justice between rival parties and incidentally ruling on whether particular documents should be restricted from being deployed in the proceedings; rather, it is a specialist tribunal mandated by Parliament to decide whether information held by a public authority should be disclosed on request, and to do so by reference to the criteria set out in FOIA. The criteria include specified absolute and qualified exemptions and, in relation to the latter, attention to the balance between the public interests in maintaining exemptions and the public interests that would be advanced by disclosure. The Tribunal's decision on disclosure is not a satellite element in some larger dispute but is the whole subject-matter of the Tribunal proceedings, which are conducted in accordance with a specific legislative mandate governing freedom of information.[10]

41. FOIA was passed in order to promote increased disclosure of information held by public authorities, subject to carefully defined limits, and a large part of the purpose of the Tribunal's statutory jurisdiction is to provide an independent check on the Government's own views on whether information should be disclosed pursuant to FOIA. In our view, to introduce into this jurisdiction the general degree of deference to Government which would be derived by reading across from the two decisions in *R (Mohamed)* into the present context would, as the Commissioner submits, 'seriously undermine the operation of FOIA'. It would also amount to a partial abdication of the responsibility placed by FOIA upon the Tribunal.

42. The case of *Roth* was concerned with the tension between basic rights and specific powers granted to Government by Parliament. The discussion in that case at [85]-[87] is of the deference due from the courts, as upholders of the rule of law, to the government on matters which a court is ill equipped to judge and which are instead within the particular expertise and responsibility of the government, such as the defence of the realm, the efficiency of immigration control, or macro-economic policy. The discussion is of limited relevance in the present context. The 'assessment of due deference ... is not to be made in a vacuum. ... In law context is everything': see [77]. In the

[10] There is a further difference between PII claims and the resolution of a disclosure issue arising under FOIA. If the Tribunal, not having accepted the views of the Government, orders disclosure, but the Government still considers on reasonable grounds that FOIA does not require the disclosure of the information, in the last resort the Government has available the power of executive override under FOIA s53. This power of veto is intended to be exercised sparingly, and is subject to further judicial review in the manner explained in *R (Evans) v Attorney General* [2014] EWCA Civ 254, but it has been validly exercised on a small number of occasions. No such executive override is available for a court decision made on a PII claim.

present context the Tribunal is specifically required by FOIA to make judgments about whether to accept what the Government says about the public interests which weigh for and against disclosure of requested information.

43. We are therefore unable to accept the overall thrust of Mr Eadie's submission concerning deference to Government witnesses, and particularly if it is rightly to be understood in its more extreme form by reference to the authorities on PII. We are not limited to considering whether the evidence has a rational basis and is put forward in good faith. We are obliged to assess the evidence as best we can. The passage cited by Mr Hopkins from *Office of Government Commerce v IC* at [102] does not stand alone. Similar remarks were made by Keith J in *Home Office and MoJ v IC* [2009] EWHC 1611 (Admin) at [29]. We are not obliged to accept the Government's evidence if we find it unconvincing, even if there is no specific contrary evidence.[11] In addition, it should not be forgotten that the Tribunal should give such weight to the Commissioner's views and findings as it thinks fit in the particular circumstances: *Guardian Newspapers Ltd and Brooke v IC and BBC* EA/2006/0011 and 0013, 4 January 2007: see at [14](2)-(5).

44. We do agree, however, that proper critical examination and assessment of Government evidence involves a judicious recognition of the extent of the Government's expertise and of the limitations of the Tribunal's or the Commissioner's expertise. We also accept that these considerations will vary according to subject-matter. We therefore acknowledge the broad point that lies behind the distinction made in the Commissioner's argument between matters of state security or international relations on the one hand and matters arising under s35 on the other, but we do not consider it would be right to treat this as a hard and fast distinction; in our view the differences are matters of degree and may vary according to the circumstances and evidence in particular cases. In every case, of whatever subject matter, the Tribunal must in our view take care to give government evidence such weight as is appropriate, taking into account the nature of the subject-matter and the witnesses' expertise and experience.

45. In the context of a PII claim the cases have drawn a distinction between the greater degree of deference given to the Government's view on the damage likely to flow from disclosure and the lesser weight given to the Government's view on the balance between such damage and the damage to the administration of justice from non-disclosure. For clarity, we would add that in our view this distinction is not directly applicable in the same way to a FOIA appeal. We consider that the general approach of giving government evidence such weight as is appropriate, taking into account the nature of the subject-matter and the witness's expertise and experience, applies to all issues. The question of what damage may flow from disclosure and the question of the balance of public interest are separate questions; the application of the general approach to the two questions is likely to differ; but the principle is the same.

[11] In his oral submissions, made before he had seen the Upper Tribunal decision in *APPGER v IC and FCO* [2013] UKUT 560 (AAC), Mr Eadie expressly accepted this last proposition, while qualifying it by saying that the weight to be attached to the judgments made by government witnesses was 'significant'.

(3) The public interest balance: weighing the benefits and detriments

46. The Department relies on the Upper Tribunal decisions in *Plowden* and in *APPGER* [2013] for a further important proposition: when competing public interests have to be assessed, care must be taken to ensure that the competing factors are properly and sufficiently identified, and this must include consideration of the particular benefits or detriments (and their likelihood) on each side of the equation. See *APPGER* [2013] at [75]-[76], [149]-[152]. For example, in *Plowden* the Upper Tribunal accepted an argument that the information which the First-tier Tribunal ordered to be disclosed was not particularly informative; this feature made it imperative that the First-tier Tribunal explained the public interest in disclosure. The Commissioner accepts this proposition, as do we.

47. Like the Commissioner, we also accept the related proposition, derived from *Plowden*, that, while it is relevant to consider the details of the information, it is also important to take a realistic view of the requested information as a package. The Commissioner here adds the clarification that this does not mean that we are required to consider the information as a broad class; the question for our decision is not whether Ministerial diaries should be disclosed. We are required to consider the particular information which is at issue in this case, and whether that information should have been disclosed when the request was dealt with by the Department in June-July 2011.

48. To these propositions we would add the following points of elucidation arising from the statutory wording and the experience of the First-tier and Upper Tribunal:

    a. The statute directs us to consider whether the public interest in disclosing the information is outweighed not by *the public interests in withholding it*, but by *the public interest in maintaining the exemption*. The latter is focused not on generalised public interest reasons why it would be good to keep the information private but on the aspects of public interest which relate to the particular exemption or exemptions which are defined by the Act and relied upon in the particular case.

    b. In many cases it would not be realistic or appropriate for the Tribunal to demand that the requester or the Commissioner spell out or explain in great detail the particular benefits of disclosure. Underlying FOIA is an assumption that there is a general public interest in the transparency of public authorities: see, for example, *Evans v IC* [2012] UKUT 313 (AAC), [127]-[133]. The public interest in disclosure has by its nature a wide ambit, since it includes the high level reasons why Parliament passed the Act and why disclosure is generally in the public interest because it promotes transparency, accountability, public confidence, public understanding, the effective exercise of democratic rights, and other related public goods. In many cases it will be possible for the benefits of transparency to be identified only at a high and generic level.[12] On the

[12] In the *Evans* case the subsequent ministerial certificate acknowledged this public interest as providing good generic arguments for disclosure of information: see *R (Evans) v Attorney General* [2013] EWHC

other side of the equation the potential harms of disclosure, and hence the particular benefits of maintaining an exemption, may be very specific. The fact that the benefits of disclosure are high level and generic does not of itself mean that they are to be regarded as insubstantial when compared with more specific benefits of non-disclosure.

c. When the quantity of information to be disclosed is small, it does not necessarily follow that it is not worth disclosing. It may be of material assistance to public understanding because it can be added to other information which is in the public domain or is likely to come into the public domain. This feature becomes more obvious in the case of requests by journalists or authors, where a small piece of information obtained through a freedom of information request may add materially to a jigsaw assembled from many sources.

d. In *APPGER* [2013] at [153] the Upper Tribunal commented on the need for a document identifying the public interest factors. At least in a case where the parties are legally represented, we would hope that the necessary collation of the relevant factors for and against disclosure would normally be contained in the skeleton arguments, so as to obviate the need for preparation of an additional document. The inclusion of a table summarising the various factors and their significance can often be of assistance.

(4) Aggregation of exemptions

49. The parties do not agree on how the public interest balance should be assessed where more than one exemption applies to a particular part of the requested information. A similar question arose in the *Ofcom* case under the Environmental Information Regulations (EIR) and was decided by the European Court in 2011. The Department submits that under FOIA we are required, when assessing the public interest balance, to aggregate exemptions and to consider the overall balance. The Commissioner submits that we should not do so.

50. The Department argues that aggregation was upheld in the decision of the European Court in *Ofcom*, and the reasoning in relation to the aggregation of exceptions under EIR applies equally to FOIA exemptions. FOIA s2(2)(b) refers to the weighing exercise being made 'in all the circumstances of the case'. As a matter of common-sense, where the same piece of information attracts two different exemptions and the question is whether that information should be disclosed, it would be odd if the exercise should be carried out in discrete compartments, one exemption at a time, particularly when it is appreciated that on the other side of the balance the public interests in disclosure may themselves be disparate and yet are weighed together.[13] Moreover it would be unfortunate and inconvenient if the balancing exercise

1960 (Admin), at Annex A [13]-[14]. This point is not affected by the Court of Appeal's reversal of the decision of the Divisional Court: *R (Evans) v Attorney General* [2014] EWCA Civ 254.

[13] Mr Eadie took us to and relied upon the expression of this point in the EIR context in the decision of the Court of Appeal, *Office of Communications v IC* [2009] EWCA Civ 90, [42].

under FOIA were found to be materially different from the exercise required under the EIR.

51. The Commissioner submits that we should not aggregate, because the provisions of the EIR are not the same as those of FOIA. The starting point is that FOIA s2(2)(b) refers to the public interest in maintaining 'the exemption', referring to 'any provision of Part II', ie, a particular exemption in the singular. The reference to 'all the circumstances of the case' is directed at the factual circumstances not what other exemptions are being legally relied on. Moreover FOIA s39 (environmental information) is a qualified, not an absolute exemption, which indicates that Parliament contemplated the possibility of different results under the two regimes. Mr Hopkins points out that the views recently expressed by the First-tier Tribunal in favour of aggregation under FOIA in *Department of Health and Social Security and Public Safety v IC* EA/2013/0081, 13 November 2013, were obiter and not based on submissions made by the parties.

52. We have not found this legal issue easy to resolve. We are unable to accept either party's submissions in full. We are not persuaded by the Commissioner's limitation on the meaning of 'all the circumstances of the case', or his reliance on the word 'exemption' being in the singular. We consider that there is a strong similarity in the relevant wording and effect of the EIR and FOIA regimes. But in our view the Department puts its case too high because it rests on an interpretation of the decision of the European Court which does not seem to us to fit what the Court actually said.

53. The factual context in which aggregation arose, so that it came before the UK Supreme Court in *Office of Communications v IC* [2010] UKSC 3, was (in outline) whether the public interest in limiting criminal activities which risked public safety should be aggregated with the public interest in maintaining private intellectual property rights. The Supreme Court was divided on the correct answer, by three to two. The minority expressed concern about the cumulation of exceptions which served disparate interests[14]. Instead of deciding the matter, the Court referred it to the European Court. The answer provided by that Court (in Case C-71/10, [2011] 2 Info LR 1, [2012] CMLR 7) was:

> art.4(2) of Directive 2003/4 must be interpreted as meaning that, where a public authority holds environmental information ... ..., it may, when weighing the public interests served by disclosure against the interests served by refusal to disclose ... ... , take into account cumulatively a number of the grounds for refusal set out in that provision.

[14] 'Third, there is no common factor behind the exceptions in article 4(2) which enables any sensible cumulation. The Court of Appeal over-looked this factor when it spoke of some "*overall* public interest favour[ing] non-disclosure" ... . The exceptions serve disparate interests, which can and must each be weighed separately against the public interest in disclosure. A public interest in limiting criminal activities which is itself insufficient to outweigh the public interest in disclosure cannot sensibly be cumulated with a private intellectual property right which is itself again also insufficient to outweigh the public interest in disclosure, in order to thereby arrive at some combined interest in non-disclosure which would outweigh the public interest in disclosure. The Information Tribunal was right to consider that cumulation of factors would lead to incongruities, and it is far from clear how it could or would work in practice.' [13]

54. We attach importance to the precise terms of this answer. First, the answer was a general answer, framed in the abstract. The European Court did not say whether on the facts of the particular case the interests of public security served by article 4(2)(b) of the Directive should be aggregated with the interests of intellectual property rights served by article 4(2)(e). Secondly, the Court did not adopt the more positive wording proposed to it by the Advocate-General, to the effect that the Directive required the aggregation of exceptions. We do not consider that the Court's choice of different words reflects only the fact that a public authority is not obliged to rely on an exception if it does not wish to do so. What is important here is that in some cases the aggregation of exceptions would be appropriate, while in others it would not be meaningful. As we read the Court's judgment, it took the view that aggregation would only be a meaningful exercise where the public interests served by the exceptions overlapped. We refer in particular to paragraph 30 of the judgment:

> ... ... the fact that those interests are referred to separately in Article 4(2) of Directive 2003/4 does not preclude the cumulation of those exceptions to the general rule of disclosure, given that the interests served by refusal to disclose may sometimes overlap in the same situation or the same circumstances. [emphasis supplied]

55. The Court here appears to accept the logical force of the point made in the minority view of the Supreme Court at [2010] UKSC 3, [13][15], while considering the minority to be mistaken in saying that there was no common factor behind any of the exceptions set out in the Directive which enabled any sensible cumulation. The point made by the minority holds good only where the exceptions serve disparate interests.

56. The Directive requires that 'the public interest served by disclosure shall be weighed against the interest served by the refusal'. This tells the decision-maker, in figurative language, to make a judgment on relative importance. This is an intellectual, not a mechanical or mathematical, exercise. 'Aggregation' or 'cumulation' effectively means 'evaluating the public interests in favour of more than one applicable exception in combination at the same time'. This is readily intelligible where the particular interests served by different exceptions overlap. But we do not understand the concept of aggregation under the EIR as directing us to treat as relevant, to a particular exception, facts which are not in truth relevant to that exception. If on considering all the circumstances the Tribunal judges that the public interest in maintaining exception X is less important than the public interest in disclosure, and that the public interest in maintaining an entirely unrelated exception Y is also less important than the public interest in disclosure, evaluating both exceptions at the same time cannot somehow make the case for maintaining the exemptions any stronger. Where aggregation makes sense and has a practical impact is in cases where the exceptions relied upon serve overlapping interests.[16]

[15] See previous footnote.

[16] We should make clear that we have not been given any information about what happened in the Ofcom proceedings after the delivery of the judgment of the European Court.

57. Moving on from the EIR to FOIA, the statutory question in s2(2)(b) is whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. While it is true that the precise language construed by the European Court does not appear in FOIA, it is also true that the wording of s2(2)(b) mirrors almost identical language of the EIR concerning the balancing exercise. In our view similar considerations apply to this exercise in the FOIA context. We do not consider that aggregation has any meaningful application where the interests served by the exemptions are unrelated. In our view the statutory direction to consider all the circumstances of the case cannot properly be read as requiring us to attribute significance to matters which are not significant. For example, if matters relevant to maintenance of an exemption controlling the release of information intended for future publication (s22) are not relevant to maintenance of an exemption for safeguarding national security (s24), aggregation will not make any difference. In such a case, including in consideration together all the circumstances relevant to both exemptions does not strengthen the case for maintaining the exemptions. In reality, attempting to treat them as weightier in such a scenario would tend illegitimately to shift the exercise from an assessment of the public interests in maintaining the particular exemptions to an assessment of the overall public interests in keeping the information private. Conversely, where the exemptions under consideration serve overlapping interests, the Tribunal should consider them together as well as singly, for in such a case the exercise of considering them together ensures that full weight is given to 'all the circumstances of the case' affecting the interests which the particular exemptions are intended to serve and impacting on the balance.

58. We should add that in our view the judgment about whether the interests served by the exemptions overlap may need to be made not only by having regard to the nature of the exemptions but also in light of the particular circumstances of the case, including the particular information to which the exemptions apply and the reasons why the exemptions are engaged.

(5) Use of parliamentary materials

59. The Department relies upon parts of chapter 6 of the House of Commons Justice Committee report: *Post-legislative scrutiny of the Freedom of Information Act 2000*, HC 96-I (3 July 2012), which discusses policy formulation, safe spaces and the 'chilling effect'. Mr Eadie submits that it is proper for us to consider this material on the basis that it is for our information.[17] This raises questions concerning the propriety of our taking this material into account having regard to parliamentary privilege, and the extent to which, even if parliamentary privilege does not exclude it, it is relevant and admissible.

60. In *Office of Government Commerce v IC* [2008] EWHC 774 (Admin), the Information Tribunal had taken Select Committee materials into account in reaching its decision. Stanley Burnton J held:

[17] Sir Alex Allan at paragraph 32 of his written statement refers to and relies upon observations made by very senior former civil servants and Ministers before the Committee, and the Committee's own emphasis on the protection of high-level discussions.

a. In the light of the nature of the judicial process, the independence of the judiciary and its decisions, and the mutual respect between the judiciary and the legislature, an opinion expressed by a parliamentary select committee is irrelevant to an issue which falls to be determined by the courts: [48].

b. Although there is no reason why the courts should not receive evidence of the proceedings of Parliament when they are simply relevant historical facts or events, in relying on the opinion of the select committee the tribunal in the case under appeal had relied on evidence that was not before it and that was illegitimate and irrelevant, and had failed in its duty to make its decision only on the basis of the evidence and submissions before it: [49], [57], [62]-[63].

c. Neither a party to proceedings before a tribunal nor the tribunal itself should seek to rely on an opinion expressed by a parliamentary select committee, since to do so would put any party seeking to persuade the tribunal to adopt a different opinion in the position of having either to accept the select committee's opinion notwithstanding that it did not wish to do so or to contend that the opinion was wrong, thereby risking a breach of parliamentary privilege: [58]-[59].

d. A tribunal may take into account the terms of reference of parliamentary select committees and the scope and nature of their work as shown by their reports. If the evidence given to a committee is uncontentious (ie, the parties to the appeal agree it is true and accurate), the tribunal may take it into account. The tribunal must not refer to evidence given to a parliamentary committee that is not agreed between the parties or to the opinion or finding of the committee on an issue that the tribunal has to determine. Nor should the tribunal seek to assess whether an investigation by a select committee, which purports to have been adequate and effective, was in fact so: [64].

61. A similar issue arose again in *R (Age UK) v Secretary of State for Business, Innovation and Skills* [2009] EWHC 2336 (Admin), [2010] ICR 260, where the Attorney General submitted that it was constitutionally improper for the court to receive in the proceedings the record of evidence given by a witness to a parliamentary committee, and the views of the committee itself. At [42]-[59] Blake J rejected this submission, and expressed his specific disagreement with some of the reasoning of Stanley Burnton J in *Office of Government Commerce.* While agreeing that the court must be astute to ensure that it does not directly or indirectly impugn or question any proceedings in Parliament, he held that it was proper for the court to receive the parliamentary material to inform itself of any consideration that might be relevant or carry weight when it reached its own conclusions which it had a constitutional duty to reach. In receiving and informing itself from Parliamentary materials, the court was not adjudicating upon whether anyone else who had expressed a view, (whether a Parliamentary Committee, a Minister or a witness to a Committee) was right or wrong as a matter of law or fact.

62. In the present case the Commissioner did not object to our receiving chapter 6 of the Justice Committee report, and neither party made any detailed submissions on the limits within which (if at all) it was proper for us to consider it or make use of it. But Parliamentary privilege is a matter which a court or tribunal must consider of its own motion where it arises, even if not raised in argument by the parties.

63. The criticisms made by Blake J of the reasoning of Stanley Burnton J were made by reference to binding authority at the highest level. We respectfully find them convincing. We consider that we should follow the view of the law set out in *R (Age UK)* in preference to that set out in *Office of Government Commerce*. This seems to us to be consistent also with what was said in *Toussaint v Attorney General of Saint Vincent and the Grenadines* [2007] UKPC 48, [2007] 1 WLR 2825, at [10]-[19]. We therefore consider, with respect, that the conclusions reached in *Office of Government Commerce* about what the Tribunal may or may not do are more restrictive than is necessary for the purpose of preventing the judiciary from trespassing on or wrongly interfering with the role of Parliament. We also do not consider that it would be correct to state without qualification that an opinion expressed by a parliamentary select committee is necessarily irrelevant to an issue which falls to be determined by the Tribunal. The weight of public interest on each side of the balance in a particular case is partly a question of fact. The Tribunal's procedural rules expressly authorise it to admit evidence whether or not it would be admissible in a civil trial.

64. The potential usefulness of parliamentary materials in FOIA cases was explained by the then presiding Judge of the Information Tribunal as set out in *Office of Government Commerce* [2008] EWHC 774 (Admin) at [28]. In the present case where the Tribunal is required to assess the weight of concerns about policy formulation, safe spaces and the chilling effect, we have found it helpful to read the chapter to which the Department has drawn attention in order to refresh our understanding of the concerns that have been expressed by persons with experience of government in relation to the matters which are the subject of s35, and the wide range of responsible views that have been expressed about those concerns. This provides additional general background which enables us to be better informed about the relevant considerations when we come to assess the witness evidence which we received in the appeal. However, noting the ambit of parliamentary privilege and the variety of views expressed to or by the Justice Committee, we do not consider that it would be appropriate for us, in reaching our decision, to place reliance upon any particular view expressed either by a witness to the Committee or by the Committee itself, and we do not do so.

<u>The balance of public interest: our assessment</u>

(1) The nature of the information and the factual context

65. As we have indicated, the request was made on 8 June 2011, and the information comprises the diary entries from 12 May 2010 to 30 April 2011. The diary is about 270 pages when printed out, with typically five to ten entries per page. The engagements which are shown are of various kinds, including internal and external meetings, telephone calls, media interviews,

Parliamentary engagements, journeys, and events such as drinks receptions and conferences. Some time is blocked out for other things such as preparation for speeches or interviews. There are also some constituency or personal appointments noted. Nearly all entries state time and venue. Sometimes the topic or subject-matter is briefly identified.

66. The heavily redacted version of the diary that was made available to the requester during the Commissioner's investigation is about 100 pages long. The redactions reveal inconsistencies of approach, and redactions of information that there was no good reason to redact. For example, the full diary shows that on a particular day Mr Lansley attended a Cabinet meeting and a meeting of the Privy Council. The redacted version of the diary reveals his attendance at the Cabinet meeting but not at the Privy Council meeting. Mr Macnaught was unable to explain the rationale for this difference of approach. A redacted entry on another day says "Parliamentary". The full entry gives the topic "Election of the Speaker" and the location "Chamber, HoC". These were public events, and it is unclear why these details were redacted. Numerous such examples could be cited.

67. We accept the evidence of Mr Macnaught to the effect that the Department is generally a high performer in its responsiveness to FOI requests, and is committed to openness and transparency. The Department publishes large quantities of information about its activities. This is in line with the Government's philosophy, alluded to in the Prime Minister's Foreword to the Ministerial Code (Cabinet Office, May 2010), that transparency builds public trust in the political system.[18]

68. Like other departments, the Department publishes quarterly information on Ministers' overseas travel, gifts (given and received), hospitality, and meetings with external organisations, including media organisations. Meetings are listed by the month during which they occurred. This is done pursuant to guidance issued by the Cabinet Office in June 2010, following the commitment made in the Ministerial Code.[19] In some cases the published release will give a clearer description of meetings than would be obtained simply from seeing the diary entry.[20] The information release which covered April 2011 was not published until March 2012. The Department was on a learning curve in regard to this; the intention was that it should be done more quickly. The Cabinet Office guidance was clarified in December 2011.

69. Mr Macnaught said, and we accept, that the Department's NHS reform programme was the principal policy focus throughout the period May 2010 to April 2011, and most of Mr Lansley's engagements touched on it to a greater

[18] Cf Ministerial Code paragraph 1.2d: 'Ministers should be as open as possible with Parliament and the public ...'

[19] Paragraph 8.14: 'Ministers meet many people and organisations and consider a wide range of views as part of the formulation of Government policy. Departments will publish, at least quarterly, details of Ministers' external meetings.'

[20] We should mention that external meetings disclosed in the Departmental information releases were redacted from the disclosed diary in reliance on s35 exemptions, leaving only the heading 'Meeting – outside interest group' or 'Meeting – other'. We consider that the inclusion of these meetings in the information releases tends to support the view that the public interest balance favoured release of these entries.

or lesser degree. Policy was also being developed on social care and on public health. Mr Lansley's personal style as a Minister involved many face to face meetings during ordinary working hours, and a substantial amount of his work on ministerial papers was done at other times.

70. Sir Alex Allan's witness statement said (and we accept): 'the inevitable reality of democratic government in the context of the 24/7 multi-channel media, particularly with the growth of the scope for instant minute-by-minute coverage on social media channels, is that ensuring that the Government's position is accurately and fairly presented in the media is a task which requires considerable attention from Ministers and their officials.' In oral evidence, he added that presentational issues were absolutely key, and it was no good having the best policy if the presentation was wrong; Ministers were very tuned in to this.

71. The NHS reforms were the main subject matter of the Health and Social Care Bill. There was a significant degree of transparency in policy formulation and development in relation to the Bill. There was considerable scrutiny of the Department's plans in Parliament and the media. Ministers also took the unusual step of pausing the parliamentary proceedings to undertake the 'Listening Exercise' in order to allow health stakeholders and the wider public an opportunity to comment further on the proposals. Considerable information about the proposals was actively placed in the public domain by the Department.

72. The information request was made at a time when the Health and Social Care Bill was still before Parliament, either during the Listening Exercise or shortly after it had been completed[21] and shortly before the 'NHS Future Forum' was to report. At the time of the request the entries in the diary within the scope of the request related to engagements ranging from over a year to just under 6 weeks earlier. By the time of the internal review just under 3 months had passed since the last entry within the scope of the request.

(2) The nature of the public interests served by the exemptions

73. The exemptions in s35(1)(a), (b) and (d) are closely related. In relation to particular entries the Department relies upon them singly or in various combinations. In broad terms, they are directed to ensuring that the work of Government Ministers and their departments is not unduly harmed or hampered by release of information under FOIA. A safe space is needed in which policy can be formulated and developed in robust discussions, where participants are free to 'think the unthinkable' in order to test and develop ideas, without fear of external interference or distraction, whether as a result of premature and lurid media headlines or otherwise. 'Ministerial communications' are defined in s35(5) so as to include communications between Ministers of the Crown and in particular proceedings of the Cabinet or any Cabinet committee. Ministers need to be able to communicate with colleagues without having to give disproportionate attention to fashioning communications to make them suitable for publication, and particular

[21] There is a minor inconsistency between paragraphs 18 and 30 of Mr Macnaught's statement; we do not regard this as significant.

protection needs to be given where disclosure would undermine Cabinet collective responsibility because the communication would reveal a view expressed by a particular Minister on a matter of policy.[22] The definition of 'Ministerial private office' refers to any part of a government department which provides personal administrative support to a Minister of the Crown. The primary purpose of protecting information relating to the operation of a Ministerial private office is to ensure that ministerial business is managed effectively and efficiently. This brief identification of the relevant interests served by these exemptions is not intended to be an exhaustive treatment, and we draw attention to the very useful discussion of arguments concerning safe space, chilling effect, record keeping, collective responsibility, and protection of officials in paragraphs 194-212 of the Commissioner's published guidance titled "Government policy (section 35)" version 1, 18 March 2013. In our view the public interests served by the exemptions in s35(1)(a), (b) and (d) in the present case overlap, and it is appropriate for us to consider them both singly and in combination.

74. The Commissioner submits, and the Department does not contest, that the broadly worded exemption in s35(1)(a) is not an exemption which has an inherent or presumptive weight independent of the particular circumstances: *Office of Government Commerce v IC* [2008] EWHC 774 (Admin), [79]. The Department submits, and the Commissioner does not contest, that in contrast, the greater specificity of the exemptions in s35(1)(b) and (d) can be taken as indicating some degree of inherent weight: *APPGER v IC and FCO* EA/2011/0049-0051, 3 May 2012, [146].[23] We bear these respective remarks in mind, but do not find them to be of much practical assistance in the present case, one way or the other. The general importance of a safe space for policy formulation and development is not in doubt. The interests which the s35(1)(b) and (d) exemptions are designed to protect are reasonably clear. Given the extent of the evidence adduced, theoretical points about whether the exemptions either have or lack inherent or presumptive weight do not seem to us to materially affect the decisions which we are required to make in the circumstances of the present case.

(3) The nature of the public interests potentially served by disclosure

75. We have referred above to the general philosophy of FOIA, that disclosure is generally in the public interest because it promotes good government through transparency, accountability, increased public confidence and public understanding, the effective exercise of democratic rights, and other related public goods. The potential benefits of disclosure include the pressure to make governmental decisions and use governmental resources in ways that will withstand public scrutiny. They also include the enabling of constructive public debate, which in effect enlists the help of responsible members of the public in fostering good government.

[22] Ministerial Code (Cabinet Office, May 2010), paragraph 2.1: 'The principle of collective responsibility, save where it is explicitly set aside, requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained.'

[23] This aspect has not been considered on the appeal from that decision to the Upper Tribunal: see *APPGER v IC and FCO* [2013] UKUT 560 (AAC). We were referred also to *Scotland Office v IC* EA/2007/0128, 5 August 2008, at [78].

76. A requester is not required to explain in the request the public interest in disclosure, and in this case the request did not contain any such explanation. The witness statements of Sir Alex Allan and Mr Macnaught refer to the following relevant aspects:

    a. the general importance of openness and transparency in public administration;

    b. the value of transparency for purposes of accountability, ie, in showing whether the public are getting good value from Ministers and whether they are properly carrying out their functions;

    c. the particular importance of transparency relating to Ministerial meetings with external organisations and media organisations, lobbying, access to Ministers, and relations with particular interest groups;

    d. contributing to proper, informed public debate in relation to all the Department's policies;

    e. contributing to public understanding of-

        i. how government works;

        ii. how Ministers spend their time;

        iii. the procedural aspects of how they operate and how they make decisions;

        iv. the focus and weight being placed on particular issues by the Minister and the Department over a particular period of time;

        v. what private interests a Minister might have, which might impact on decision-making;

        vi. the health service reforms and their development;

        vii. the inter-departmental aspect of the NHS reforms as part of the democratic process.

77. We agree that all these are of potential relevance. We observe that the point concerning who has access to Ministers is not limited to face to face meetings.

(4) Impact of disclosure on the interests served by disclosure

78. In this and the following section we consider the impact of disclosing those diary entries to which one or more of the s35 exemptions applies and which are not protected by ss23, 24 or 40(2). We take first the impact on the interests served by disclosure.

79. In order to evaluate the rival contentions of the Department and the Commissioner it is necessary for us to appraise the witness evidence given by Sir Alex Allan and Mr Macnaught. Sir Alex has had wide experience at the highest levels of government, including working in private office for two Prime Ministers and for the Chancellor of the Exchequer, and being Permanent Secretary to the Department for Constitutional Affairs. At the DCA he was responsible for bringing FOIA into force. Mr Macnaught as Director of Assurance is responsible for the Department's corporate governance, assurance, risk management and internal audit. At various stages of his career he has been a Private Secretary to the Minister for Public Health (1999-2001) and Head of Briefing (2008-2009). He was Principal Private Secretary to the Secretary of State for Health from November 2009 to September 2012; this period included the whole of Mr Lansley's tenure.

80. The experience of Sir Alex and Mr Macnaught is impressive. As regards Sir Alex we accept that, as he expressed it, he is 'well placed to assist us in understanding the operation of Cabinet Government, Ministers' private offices, and the nature and purpose of Ministers' diaries'. We similarly accept, in regard to Mr Macnaught, that he is well placed to assist us on these topics with particular reference to the Department of Health in the relevant period and to the circumstances of Mr Lansley's time as Minister. Where we find their evidence less impressive is in relation to the evaluation of the likely consequences of disclosure, on each side of the balance. Their written evidence contained some features which raised questions in our minds about their respective evaluations, and our concerns were not dispelled, but rather heightened, by their oral evidence. We indicate these where relevant below.

81. Both witnesses expressed the view that the value of disclosure would be small or even negative. Their evidence placed particular reliance on two broad themes in support of this view. One was that most of the information which served the public interests in disclosure was in the public domain as a result of other forms of disclosure. The other was that because the diary entries only reflected the Minister's engagements, and were sometimes uninformative, they would give an incomplete and possibly misleading picture of how the Minister worked and how he spent his time.

82. In regard to the first of these themes, the influence of external organisations and lobbyists on Ministers is well-known to be a matter of legitimate and pressing public concern. In their written statements both Sir Alex and Mr Macnaught asserted that the public interest in transparency regarding who had access to Ministers was 'fully met' by the quarterly information releases. These assertions seriously reduced our confidence in the objectivity of their evidence and the accuracy and soundness of their evaluative judgments. We observe:

a. The information release which covered the latter period of the diary had not been published at the time the information request was dealt with, was not in fact imminent, and was not published until many months later.

b. The information release system did not extend to meetings by video conference or by telephone. In our view it is unrealistic to regard face to face meetings as the only contacts that are of significance for understanding who has access to Ministers.

c. While in some cases the information releases, when finally published, gave a clearer description of meetings than the corresponding diary entry would have done, the information releases were not always informative.[24]

83. Mr Macnaught's written statement said that the 'legitimate public interest' in 'understanding the potential for external influence on the policy development process' was, in his view, 'fully met by the publication of the external meetings', hospitality and other details in the information releases. When asked about this, he conceded that 'perhaps the word "fully" was an overstatement', and he 'would not necessarily disagree that, if the public should know who the Minister was meeting, it should also know who he was speaking to on the telephone'. In our view this was a logical and necessary concession.

84. Sir Alex's statement that, by reason of the release system, 'the public therefore do already have a proper, complete record of which external bodies and media organisations have had access to Ministers', did not correspond with reality and lacked rational justification. When asked about the relevance of access by other methods than meetings in person, he parried the questions by saying that the occurrence of telephone calls was not always recorded and that face to face meetings were the most important means of access for serious discussions. His determination to avoid directly conceding the indefensibility of what he had said in his witness statement further reduced our confidence in his evidence. We would add that, in relation to his oral evidence as a whole, our general impression was that he was keener to repeat generalised lines to take than to give direct answers to our or Mr Hopkins' questions; this further diminished the confidence which we were able to place in the judgments which he expressed.

85. We readily accept that publication of the diary entries could not be guaranteed to give an exhaustive picture of who had access to Mr Lansley, not least because of the possibility that some telephone calls were missed from the record. But we consider it to be clear that the diary entries would have provided worthwhile additional information on the topic of external access, and would have done so even if (contrary to the fact) the external meetings information release had been published or imminent at the time of the request.

[24] For example, a meeting and discussion with a think tank in January 2011 is not listed in the relevant information release as a meeting with an external organisation, but only in the hospitality section as 'lunch'.

86. In our view the witnesses drew unwarranted conclusions from the lack of perfection and lack of exhaustiveness of the diary. For example, they emphasized that the diary could not show the public how much time the Minister spent overnight or at weekends making decisions on paper (because for the most part only engagements were shown[25]), and could not show the relative focus and weight that was being placed on particular policy issues (because while some issues would be dealt with at meetings, others would be dealt with on paper). Nor would disclosure provide an exhaustive record of the Minister's meetings, because he would sometimes have an ad hoc meeting with an official or a series of unscheduled meetings to deal with a crisis. These and similar points were said to show that the contribution of the diary to public understanding of the Minister's work would be (as Sir Alex put it) 'highly limited'. But these kinds of points, while justified as regards what the diary would not show, simply ignore the value of what the diary would show. It would provide significant information about that part of the Minister's workload which consisted of engagements, and to some extent would reveal the broad topics on which the Minister was spending time at meetings.

87. The witnesses stressed that the diary entries could mislead the public, who might think (for example) that Mr Lansley did very little work other than the meetings and telephone calls listed in his diary. We consider this to be a minor factor. When information is published, there is always the possibility that some members of the public or Press may misinterpret it. But we consider that the ordinary member of the public would readily understand that an engagements diary does not reliably present a complete picture of a person's working life, and that gaps between engagements do not indicate that no work is being done. A related point is the contention that the diary is written in economical language, which is comprehensible to private office staff but could sometimes be confusing to the public. There is an element of truth in this, but having seen the diary entries we judge it to be a minor factor in assessing the significance of disclosure.

88. The witnesses stated that the value of disclosure of the diary entries should be judged in the context of what was already in the public domain. For example, prior to the request there was an enormous amount of information in the public domain concerning the policies being developed in the NHS reforms. We fully accept both the principle of this point and the fact that there was a great deal of information in the public domain concerning the Department's policies. The question is whether the diary information would add materially to public understanding. So far as concerns the substantive content of the policies being dealt with in the relevant period, we accept the Department's evidence that the diary entries would add little to public understanding. We do not understand the Commissioner to contend to the contrary.

89. Sir Alex also stressed the mechanisms of accountability other than through FOIA, particularly through Parliament. The existence of other mechanisms does not alter the fact that FOIA is, as he himself said, 'an important additional mechanism of accountability for Government departments'. We

[25] There is some limited reference to desk work.

agree that the significance of disclosure in relation to accountability must be judged with the contributions made by the other mechanisms in mind.

90. Drawing on the above discussion and having considered the evidence, we summarise in the following table our assessment of the impact of disclosure in this particular case on the interests served by disclosure:

Interests served by disclosure	*Impact if disclosed*
general value of openness and transparency in public administration	positive but adds nothing of significance to more specific considerations listed below
accountability: whether the public was getting good value from the Minister and whether he was properly carrying out his functions	positive
transparency relating to Ministerial meetings with external organisations and media organisations, lobbying, access to Ministers, and relations with particular interest groups	high
contributing to proper, informed public debate in relation to the Department's policies	minimal
contributing to public understanding of-	
how government works	significant
how the Minister spent his time	high
the procedural aspects of how he operated and how he made decisions	significant as regards how he operated, but not on how he made decisions
the focus and weight being placed on particular issues by the Minister and the Department over a particular period of time	positive
what private interests a Minister might have, which might impact on decision-making	negligible
the health service reforms and their development	positive but minor
the inter-departmental aspect of the NHS reforms as part of the democratic process	positive but minor

(5) Impact of disclosure on the interests served by the exemptions

91. The Department contends that fuller disclosure of the diary in response to the request would have harmed the interests served by the three relevant s35 exemptions in a variety of ways, and that some of these harms would apply similarly in relation to other Ministerial diaries which might be thought disclosable in the future in reliance on the precedent set by disclosure in the present case[26]. In summary:

    a. Disclosure would be potentially misleading to the public and Press, and so would necessitate explanations to be given at the time of disclosure and substantially more time to be spent on media handling.

    b. It would fuel politically mischievous speculation about relations between Ministers, and between Ministers and senior officials, particularly in the context of coalition government. This would be burdensome and distracting to respond to.

    c. Fear of further such disclosures in the future would encourage Ministers and officials to adjust their appointment schedules, building in unnecessary or pointless[27] meetings so as to create the right impression.

    d. Fuller disclosure in this case would have impeded the intensive activity of policy formulation and development in the run-up to the Health and Social Care Act 2012. The need for a safe space for policy making does not only relate to the substantive content of policy; it also has a procedural aspect of enabling ministers and senior officials to engage in meetings without the fact of the meetings generating public discussion and speculation.

    e. Disclosure would adversely impact on Ministers' ability to communicate freely with each other as and when necessary.

    f. Disclosure could inhibit proper record-keeping in the future.

    g. Ministers are freer to meet more individuals and groups if the fact of the meeting will not be disclosed to the public.

    h. Making diaries suitable for disclosure would be a distraction from the efficient organisation of the Minister's time and would be likely to require

[26] Department's written submissions, paragraphs 34, 42, 48-56, 61-62, 66, 68, amplified orally and in witness evidence.

[27] The epithet 'pointless' was used in the Department's skeleton at paragraph 42. It seemed to us a fair characterisation of the spectre raised in the witnesses' written statements (Sir Alex at paragraphs 35-37, Mr Macnaught at paragraphs 41-43). The witnesses' joint written answers disclaimed the suggestion that the meetings would be pointless and said that the point of them would be the impression made upon the Press.

the attention of higher grade civil servants for keeping the diary than currently undertake the task.

92. In regard to the contention that some of these harms would apply similarly in relation to other Ministerial diaries which might be disclosable in the future in reliance on the precedent set by disclosure in the present case, the Commissioner submitted that all arguments which depended upon an assumption of routine disclosure of Ministerial diaries were misconceived. Each case must be considered on its own facts. Even if disclosure is ordered in this particular case, it does not mean that similar information must be disclosed in the future.

93. We accept the Commissioner's argument on this, but only as far as it properly goes. It is the facts of the present case that we must consider. The facts of future cases are likely to be different. (One difference which has already come about is that the system of quarterly information releases is operating more efficiently than it was at the time the current request was dealt with by the Department.) On the other hand, we consider the Department is entitled to point to consequences which it says will flow if more of Mr Lansley's diary is disclosed, including consequences for the conduct of other Ministers who are concerned, or whose officials are concerned, that the same outcome might apply in a future case.

94. We have discussed above the issue of disclosure being potentially misleading to the public, in the context of assessing the value of disclosure. Here our focus is on the extent of the additional burden that would fall upon the Department because it would feel obliged to publish additional explanations in order to correct actual or potential misunderstandings. Such burden, in so far as it exists, would be a distraction from the more important work of the private office. In our view, having considered the witness evidence and the diary entries, this additional burden would be modest. It is not a difficult task to publish a short explanation which makes clear that a Ministerial diary does not give a complete picture of how a Minister spends his time, or of communications between Ministers or between a Minister and his senior officials, or of the relative degree of focus on any particular policy area, and which states the meaning of any obscure jargon terms or acronyms.

95. Mr Macnaught in his closed evidence gave an example where the presence in the diary of meetings on a particular topic might mislead the public into thinking that the Minister was in favour of a particular controversial course of action, when in fact he was not. We accept that there may be a few instances of this or a related kind, where the Department would wish, in the interests of good government and effective presentation, to add to a FOIA disclosure some brief explanation of the Minister's position. As Mr Macnaught said, 'it is a wholly normal and proper part of a Department's function to think about how its policy-making is communicated to, and understood by, the media and the public'. We infer from this and from Sir Alex's evidence that media handling is a regular daily task for the Department to which significant resources are allocated. We conclude that the Department would take in its stride any need for some additional explanations.

96. We accept that there is some limited substance in the concern about disclosure possibly fuelling speculation about relations between Ministers, or between Ministers and senior officials, particularly in the context of coalition government. While sometimes this could be ignored, we accept that in some instances additional work could well be required, and that this could be a distraction from more useful work. Speculation is frequent in any event, and we consider that this concern is a modest factor.

97. Sir Alex Allan and Mr Macnaught both gave evidence concerning the danger of Ministers being prompted in the future to build in futile or unnecessary meetings or other diary appointments as window-dressing in order to create the right impression upon disclosure of their diaries. This evidence compounds our difficulties over accepting their evaluative judgments as being objective and reliable. We do not accept it. We agree with the Commissioner's criticism that it depicts Ministers as unduly terrified of media stories. In particular:

    a. Their evidence on this point seems to us to be not fully consistent with their acceptance that Ministers and senior officials are accustomed to operating in the glare of media scrutiny and are rightly expected to exercise the fortitude necessary to maintain high standards of conduct. When Mr Randall described to Sir Alex the tenor of his 40 years' experience of the considerable robustness of Ministers, Sir Alex did not dispute that Ministers were normally robust, but responded by saying that, however robust, a Minister might feel it would be easier to have a meeting rather than have to defend why not. We do not find this answer satisfactory. In our view it amounts to denying that a Minister would be expected to have the fortitude to do his or her job properly, rather than being deflected into having unnecessary meetings for fear of the possibility of mischievous speculation. In addition, the kind of speculation envisaged would seem to depend on an underlying premise that a Ministerial diary captures all communications between the Minister and other people – a premise which could easily be rebutted.

    b. When Ms Lowton asked Sir Alex about the same topic, he stated that he had no evidence that the publication of the lists of external meetings in the information releases pursuant to the June 2010 guidance either had had or would have any adverse impact on ministerial behaviour.

    c. In answer to further questions from Ms Lowton, Sir Alex said that ministers with blank time in their diaries set aside for thinking might well change their behaviour to ensure that meetings were filling the blank time. We find this suggestion incredible. In view of Sir Alex's own acceptance of the robustness of Ministers, we consider it lacks any solid justification and is mere alarmism. In the unlikely event that a Minister were sufficiently pusillanimous to be concerned to this degree about what the public might think of blanks in the diary, the concern could be met by entry of the word 'paperwork' or 'reading time' or some other appropriate descriptor into the blank spaces.

    d. Mr Macnaught's written statement spoke of 'pressure to schedule meetings simply to bolster the appearance that issues had been accorded

> due weight'. The Government could resist such pressure, if it existed, by pointing out that diary entries do not show the relative weight given to particular substantive issues. The suggestion that such pressure would have a material impact on a Minister's allocation of his time seems to us much less realistic than Mr Macnaught's answer when he was asked by Mr Hopkins about the topic of media speculation concerning the purpose of meetings with another Minister. He said such speculation was 'the stuff of political life'; the Minister 'would live with it', and a Minister who could not live with it 'would not last long'.

98. In regard to the substantive aspects of the safe space required for policy-making, we accept that there might be particular instances where disclosure of a diary entry which revealed a particular option under consideration could have a significant material impact. However, because the descriptions of meetings and telephone calls are normally brief and do no more than (at most) identify the general topic, and because the public would often be well aware of the policy topics under discussion at a particular time, these instances would be relatively unusual. We accept the Commissioner's view that, because the diary entries give no detail about the anticipated discussions or the intended objectives, disclosing them would in general be unlikely to compromise the freedom to think the unthinkable, consider all options and argue for and against positions. The evidence has not satisfied us that there are entries in Mr Lansley's diary which required protection for the preservation of substantive safe space.

99. As regards 'procedural' safe space, according to Sir Alex's written evidence:

> 'Ministers and senior officials need safe space in which to meet each other as frequently or infrequently as they wish in order to discuss policy formulation. The disclosure of Ministerial diaries would, in my experience, inhibit and distort this process. In particular, this is because the inevitable resultant public speculation from the disclosure of the pattern of Ministers' meetings would lead Ministers both to focus their attention on the presentational impact of the material in their diaries and require the undue devotion of resources in contextualising and explaining the way in which they have allocated their time.'

100. Our attention has not been drawn to any judicial consideration of the concept of a procedural aspect of safe space. It is not mentioned in the Commissioner's guidance or in the chapter of the Justice Committee report to which our attention was drawn. We asked Sir Alex about his 'experience' of the disclosure of Ministerial diaries, to which he referred in the 2nd sentence of the evidence which we have quoted. He was not able to cite any. We found this part of his evidence puzzling, and inconsistent with other evidence that he gave, which was to the effect that the present case was the first occasion on which the release of a Ministerial diary has been considered. It became clear that he had no experience of the disclosure of Ministerial diaries, or of the distortion of the policy formulation process by such disclosure. This reduced the persuasiveness of his prediction that disclosure would lead Ministers to focus their attention on presentational impact and to require that resources be expended to explain their allocations of time.

101. Mr Macnaught expressed similar views. He considered that Ministers' ability to engage in effective policy formulation and development would be inhibited by 'pressure to ensure that the diary itself conformed to whatever media expectations at the time happened to suggest was an appropriate allocation of the Minister's time'.

102. We consider there is some justification in the concern about the procedural aspect of safe space for policy formulation and development, but we are not satisfied on the balance of probabilities that it is anywhere near as serious as predicted by Sir Alex or Mr Macnaught. Save in rare cases, we think it improbable that Ministers, who are rightly expected to be robust, would alter their engagements to conform with media expectations. The more practical issue would be dealing with extra inquiries from the Press or public about the purposes of the meetings or other contacts shown in the Minister's diary. Where this arose, to some extent it would involve some extra work, and hence have resource implications. In this regard, Sir Alex stated that the additional focus on presentation would have no benefit for the operation of good and effective government. We consider this to be an overly negative assessment. We have referred above to his evidence concerning the importance of good presentation. The purpose of good presentation, as we understand it, is for increasing public understanding and gaining public acceptance and support for Government policies. In our view this is a public benefit, which would on occasion be the result of answers to Press inquiries about a Minister's engagements. To put it another way: when on the one hand the Government decides not to give out additional explanations to the media, so that without distraction it can 'get on with the job' of policy development, there are no significant resources wasted; when on the other hand the Government decides to use its resources to give out additional information and explanations to the media, it may be expected to do so in a way that will serve the public interest of increasing public understanding and public acceptance of the Government's policies and processes. This approach is in line with the practice of disclosing details of Minister's meetings with external parties, the Government having presumably taken the view that such disclosure does not unduly hamper the Minister's work and is justified in the public interest.

103. Mr Macnaught's statement gave examples of meetings which he considered should not be disclosed to the public because of the risk of damaging and disproportionate distraction in order to deal with speculation that Ministers were operating in particular cliques[28]. Sir Alex's written statement made a similar point. However, in answer to questions from Mr Hopkins, Sir Alex accepted that the risk of undermining collective cabinet responsibility by publication of diary entries showing with which other Ministers a Minister had had contact was 'not direct' and was 'relatively removed'. Sir Alex's concern was that it would 'lead and reinforce speculation' about disagreements between Ministers.

104. In our view these concerns need to be assessed in light of the facts that (i) the public would rightly expect that Ministers would meet with other Ministers to discuss policy formulation, (ii) Press speculation about differing views of Ministers goes on all the time, (iii) the diary entries do not reveal the

[28] Paragraphs 50-54.

views of any Minister on any matter of policy, and in particular (iv) the mere fact of a meeting, even when coupled with identification of the topic discussed, does not of itself reveal anything about agreement or disagreement between Ministers. We conclude that these concerns generally have limited weight and have no real bearing on Cabinet collective responsibility. We accept, however, that there may be a very few special instances where a diary entry shows a meeting between Ministers together with the subject matter of the meeting, which might, if disclosed close to the time when the meeting took place, give rise to such significant interactions with the Press and public as to intrude on the safe space for policy-making, because of the particular circumstances then pertaining. On the evidence placed before us in the appeal, we have not been persuaded that in the present case there were any entries in this exceptional category. We return to this topic below, under 'Conclusions and remedy'.

105. Concerns were expressed to the Justice Committee about record-keeping, and a range of views was noted, including that there had been some change as a result of FOIA, that there had been little change, or that such changes as had occurred were mainly due to other causes. Mr Macnaught's statement said that if Ministerial diaries were disclosable there was a risk that Ministers would choose to hold particularly sensitive meetings without them being recorded in the diary and potentially even without the knowledge of the Department. Sir Alex observed in his statement that the key requirement was that records of meetings and decisions were kept, and there was no requirement to record them in the format of the diary in the present case, so it might be that a private office would record them elsewhere than in the working diary, if it was thought that the diary was at risk of disclosure. We did not find their evidence helped us as regards the degree of likelihood that any of these consequences would follow from the disclosure of Mr Lansley's diary. The section 35 exemptions are not absolute. Since FOIA was passed, there has always been the prospect that entries from Ministerial diaries might be disclosed to the public. The evidence in the present case does not persuade us that disclosure of Mr Lansley's diary would be likely to have a material impact on the quality of future record-keeping relating to the work of Ministers.

106. The more general consideration that Ministers are freer to meet more individuals and groups if the fact of the meeting is not disclosed to the public seems to us to have little practical force as a reason for general non-disclosure of diary entries. Most external meetings are disclosed by the Government. Some are disclosed by the person or organisation who met the Minister. Where, unusually, there is a particular need for a meeting to be confidential, the information is likely to be protected by FOIA s40(2), s41, or another exemption which relates to the particular purpose of the meeting.[29]

107. The Department contends that making diaries suitable for disclosure would be a distraction from the efficient organisation of the Minister's time and would be likely to require the attention of higher grade civil servants for keeping the diary than currently undertake the task. This is supported by Mr Macnaught's evidence[30]. We accept the gist of this part of his evidence. We

[29] The examples given by Mr Macnaught in paragraphs 61-62 of his statement would in our view fall within s40(2) and/or s41. Entries of these kinds would not be disclosable and would be redacted.
[30] Paragraphs 57-59 of his written statement.

assess this as a significant factor, but the weight properly to be given to it is somewhat limited in our view by the fact that a properly thought out and standardised system for making entries in Ministerial diaries could reduce potential presentational issues. Mr Macnaught agreed this would make a difference. In our view it would go a substantial way to mitigating this concern.

108. Sir Alex said that a further issue that would cause time and effort in Ministerial private offices in preparing diaries for publication arose where entries deliberately concealed information from a wider audience within government for security or other special reasons – for example, during Sir Alex's time in 10 Downing Street, entries which concealed the Prime Minister's visits to Northern Ireland. Mr Macnaught did not say that this difficulty would apply in the case of Mr Lansley's diary. We have no reason to think that these special cases could not appropriately be dealt with when arising in the future by a redaction made under whichever exemption was applicable in the circumstances.[31]

109. We summarise in the following table our assessment of the impact of disclosure in this particular case on the interests served by maintenance of the relevant s35 exemptions. Without seeking to delimit precise boundaries, the s35 exemption to which the potential impact is mainly relevant is indicated in the middle column.

Claimed impacts on the interests served by maintaining one or more of the exemptions	*Rel.*	*Our assessment of the severity and likelihood of the claimed impact*
Potentially misleading information would need to be explained	(a), (d)	Modest additional burden is likely.
Speculation about relations between Ministers, and between Ministers and senior officials, particularly in the context of coalition government; burdensome and distracting to respond to	(a), (d)	Some modest additional work would be required.
Encouraging Ministers and officials to adjust their appointment schedules, building in unnecessary or pointless meetings so as to create the right impression	(a), (d)	Unlikely to occur.
Impeding policy formulation	(a)	Generally no impact on

[31] It is not necessary for the purposes of our present decision to consider whether there are limits on the circumstances in which misinformation qualifies as information within the meaning of FOIA. Cf the discussion of a similar issue in a different context in *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd* [2007] EWCA Civ 197 at [58].

and development, particularly in the run-up to the Health and Social Care Act 2012.		substantive safe space for policy-making. Procedural aspect: inquiries about purposes of meetings or contacts could generate some extra interaction with Press and public which would usually be limited but might in exceptional cases (not demonstrated here) significantly intrude on the safe space..
Impact on Ministers' ability to communicate freely with each other as and when necessary	(b)	No real bearing on collective responsibility. Special cases might give rise to a significant additional workload (but not demonstrated in this case).
Inhibition of proper record-keeping in the future, with consequent impact on operation of government	(a), (d)	Unlikely to have a material impact.
Curtailing Ministers' freedom to meet individuals and groups	(a)	Little effect on this.
Resource impact on private office, which would need to allocate higher grade civil servants to keeping Ministers' diaries	(d)	A significant factor, likely to occur, but capable of partial mitigation by a standardised system for making diary entries.

(6) The public interest balance

110. The question which we have to answer is whether in all the circumstances of the case, at the time when the request was made and the Department responded to it, the public interest in maintaining the s35 exemptions outweighed the public interest in disclosing the information. The first conclusion that we draw from our analysis and assessment of the competing factors is that this is not a case where the balance is plainly overwhelming in one direction or the other; instead, there are some significant points on both sides. When the varying weights of the factors on each side of the balance are combined, we consider that this is not a case where the public interest in maintaining the exemptions outweighed the public interest in disclosure. As we have indicated, there are in our view some likely real impacts on the interests served by the s35 exemptions, but they are relatively modest and we consider they are outweighed by the more significant benefits of disclosure which apply in this case. In our judgment, in agreement with the conclusion maintained by the Commissioner, the balance comes down on the side of disclosure, albeit not by a particularly large margin. In our view this is so whether the exemptions are considered singly or cumulatively.

111. We noted earlier the Commissioner's concession that the non-Ministerial nature of certain of the engagements must be taken into account in assessing the public interest balance. We agree that this is relevant, but the entries are relatively few, so that their presence does not materially affect the overall balance. Nor, in our view, does it lead to the conclusion that these particular entries should be withheld in the public interest. The entries are subject to certain partial or total redactions under s40(2), as previously indicated. In our view the disclosure of the unredacted remainder does not involve a material adverse impact on the interests which the s35 exemptions are intended to serve.

112. In cases where reasons for the maintenance of exemptions include the burdens associated with making the disclosure, s12 (cost limit) and s14 (vexatious or repeated requests) can be relevant considerations. We do not regard them as relevant to our assessment in the present case, because it does not appear that the adverse impacts relied upon by the Department would be materially mitigated by reliance on those sections.

Section 36

113. By the terms of s36(1)(a), the s36 exemption cannot apply where information falls within a s35 exemption. Accordingly we consider that in the circumstances of the present case s36 can make no difference to anything that we are called upon to decide.

Conclusions and remedy

114. The Commissioner invited us to vary the Decision Notice to the limited extent necessary to reflect the Commissioner's acceptance of some aspects of the Department's case, as referred to above, but otherwise to dismiss the appeal. We conclude that this is the appropriate course for us to take.

115. Given the number of entries in Mr Lansley's diary, and the practical difficulties faced by the Department in preparing detailed evidence without knowing the Tribunal's reasoning and findings, we considered that it would be right to give the Department the opportunity to justify to the Commissioner (and, if not agreed, to the Tribunal) any special cases of entries or part entries falling within the exceptional category referred to in paragraph 104 above, which ought to be redacted notwithstanding the Tribunal's more general findings on the balance of public interest. We did this by sending the parties a confidential draft of our decision on 28 January 2014, and laying out a timetable for the consideration of this aspect. After consideration, the Department decided not to seek to identify any such special cases.

Signed on original:

Andrew Bartlett QC

Judge