First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2020/0136V

Heard by CVP on 9 February 2021

Before

JUDGE ANTHONY SNELSON

Between

MINISTRY OF JUSTICE

Appellants

and

THE INFORMATION COMMISSIONER

First Respondent

and

MR PATRICK COWLING

Second Respondent

DECISION

On hearing Mr E Metcalfe, counsel, on behalf of the Appellants, Mr W Perry, counsel, on behalf of the First Respondent, and the Second Respondent in person, the decision of the Tribunal is that:

(1) To the extent specified in the substituted decision notice set out in para (2) below, the disputed information is exempt under the Freedom of Information Act 2000 ('FOIA'), s43(2) and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(2) The Tribunal issues a substituted decision notice in the following terms:

The Appellants shall, no later than 21 days after the date of promulgation of the Tribunal's Decision, disclose the requested report subject to the following redactions:

Page 8, Paragraph 12A:
Line 1: redact first and final words (same abbreviation),
Lines 2-7: redact from line 2 second word to line 7, full stop,
Line 9: redact 5th word (same abbreviation as in line 1).

Page 9, Paragraph 12C
Lines 9-21: redact from line 9, 4th word to end of paragraph.

Page 10
Penultimate line: redact the forename and surname of the second-named individual.

(3) The appeal is allowed to the extent stated in paras (1) and (2) above but is otherwise dismissed.

OPEN REASONS

Introduction

1. In January 2019 the Appellants (hereafter 'MoJ'), experienced an IT systems failure [1] which seriously impaired the functioning of its internal email, telephone and web-based services and those of a number of bodies under its responsibility. The episode lasted for over a week and resulted in significant disruption. The courts were particularly affected, with many being forced to adjourn cases to fresh dates.

2. The MoJ caused two reports on the systems failure to be produced. One, ultimately issued on or about 23 August 2019[2], was a lengthy, technical document prepared for the Department's Chief Digital and Information Officer ('CDIO'). I will refer to this document, which has not been published, as the CDIO Report. The other, which took the form of an undated letter under the authorship of Ms Shirley Cooper, a non-executive director of the MoJ, was addressed to the Permanent Secretary and seems to have been received by him in late April 2019. I will call this document, which is concise (10 pages) and anything but technical, the Report or, where necessary for clarity, the Cooper Report.

3. The Report was commissioned mainly for the purposes of ascertaining what had brought about the systems failure and what lessons the MoJ should learn from it. As the MoJ's witness before me acknowledged, Ms Cooper professed no expertise in IT matters and drew heavily and openly on technical information contained in an early draft of the CDIO Report. She offered some

[1] The failure consisted of three unrelated 'outages', all of which occurred coincidentally within a few days of each other.
[2] Over the preceding months, it had been shared in draft with interested parties and undergone a number of iterations.

opinions as to where responsibility for the relevant events lay, as to protective measures taken and not taken, and as to steps that might be taken in the future (including revision of the MoJ's external contractual arrangements) to prevent or mitigate damage resulting from similar events. But her report was heavily caveated and warned against drawing "too many conclusions" from the January 2019 episode. In her open witness statement, para 18, the MoJ's witness comments that the Report "may be construed as criticism" of a particular team within MoJ. To avoid the risk of the open statement accidentally giving a misleading impression, I place on record here the fact, undisputed in the open proceedings before me, that the Report at different points contains remarks which can be seen as critical on more than one ground of more than one person, team or entity. As Mr Metcalfe in his open skeleton argument points out, it also includes (among other things) observations about the structuring of an agreement between MoJ and a named services provider, which I will call the NSP, remarks concerning the cost of one particular IT system and the possibility of replacing the provider, and a suggested approach to any renegotiation of a particular contract.

4. On 18 June 2019 the Secretary of State for Justice, responding to a written parliamentary question, made the following statement in the House of Commons:

> **The independent review commissioned by the Permanent Secretary was finalised in May.[3] To protect the department's security and commercial interests we will not be publishing this report. I can confirm that the report found that three separate and unrelated issues occurred at the same time, creating significant business impact. Steps have already been taken to learn lessons from these incidents. We are working closely with our suppliers to make sure that diligent care is taken of the department's infrastructure, accompanied by a more robust internal capability to control and manage our vital services.**
>
> **An updated business continuity plan for the department will be completed this month; that plan will include specific scenarios around significant IT failure covering one or more of our agencies. We are also reviewing the monitoring applied to the core networking infrastructure to provide us with earlier sight of any future problems. There was no evidence of any foul play, and no data was lost during the incident.**

5. Mr Patrick Cowling, the Second Respondent, is and at all relevant times was a researcher with the BBC. On 24 June 2019, he wrote to the MoJ, requesting, pursuant to the Freedom of Information Act 2000 ('FOIA') a copy of the "independent review commissioned by the Permanent Secretary into the causes of the probation and courts IT systems failure in January 2019".

6. The MoJ responded on 22 July 2019, refusing to supply the information and citing FOIA, s43(2) (prejudice to commercial interests).

[3] For present purposes nothing turns on the unexplained fact that the Secretary of State put the date of 'finalisation' as some time after the document is said to have been delivered to the Permanent Secretary.

7. Mr Cowling challenged that response but, by a letter dated 11 September 2019 following an internal review, the MoJ maintained its refusal based on s43(2).

8. On 25 September 2019, Mr Cowling complained to the First Respondent ('the Commissioner') about the way in which his request for information had been handled. An investigation followed, at a late stage of which, rather surprisingly, some confusion arose as to the document sought. All parties to this appeal agree that the request was for the Cooper Report and that the CDIO Report was not within its scope.

9. By a decision notice dated 3 March 2020 the Commissioner determined that the exemption relied upon was not engaged and required the MoJ to disclose the requested information. Addressing a further issue about privacy rights of two civil servants mentioned in the Report (a matter which had arisen for the first time in the course of the investigation), she further directed the MoJ to disclose the name of the senior civil servant but found that the junior civil servant's identity should be protected.

10. By a notice of appeal dated 31 March 2020, the MoJ challenged the Commissioner's adjudication. In the accompanying grounds it re-stated its reliance on s43(2) but also prayed in aid for the first time s36(2)(b)(i) and (ii) and (c) (respectively, inhibition of free and frank advice, inhibition of free and frank exchanges of view, and prejudice "otherwise" to the effective conduct of public affairs), relying on a written submission in the name of a statutorily recognized 'Qualified Person', Mr Alex Chalk MP, Parliamentary Under-Secretary of State for Justice, that the withheld information was exempt under s36(2). In the section of the submission headed 'Recommendation' (para 7), it was proposed that the Minister agree that the Ministry should appeal against the Commissioner's decision under s36(2)(c) (only). However, at para 10, in a section entitled 'Argument', the case is made that publication of reports like the Report might inhibit the giving of frank advice and so adversely impact upon public service (the s36(2)(b)(i) ground).

11. The Commissioner resisted the appeal in a document dated 25 August 2020.

12. Having been joined as Second Respondent pursuant to a direction of the Tribunal, Mr Cowling delivered a response to the appeal dated 10 September 2020.

13. In a reply of 15 September 2020, the MoJ joined issue with the responses of the Commissioner and Mr Cowling.

14. To their credit, the parties were able to agree on one matter prior to the hearing, namely that, even if the Tribunal ordered disclosure of the Report, the privacy

rights of the junior civil servant mentioned in it must be protected[4] and that accordingly that person's name should not be disclosed.

15. The appeal came before me in the form of a 'remote' hearing by CVP. All parties were content for it to be held in that way. Open and closed bundles were before me. I also had the benefit of detailed skeleton arguments from both counsel and from Mr Cowling, who presented his case succinctly and with clarity. I heard evidence from one witness, Ms Sally Devine, called on behalf of the MoJ. It was necessary to hear some of her evidence in 'closed' session, following which counsel helpfully drafted a 'gist', which was read out as soon as the 'open' hearing resumed. Concluding submissions were likewise divided between 'open' and 'closed' sessions. The hearing occupied the entire sitting day and I reserved my decision.

Legislation and Principal Authorities

16. FOIA, s1[5] includes:

> **(1) Any person making a request for information to a public authority is entitled–**
>
> **(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and**
> **(b) if that is the case, to have that information communicated to him.**

17. S36 includes:

> **(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –**
> **…**
> **(b) would, or would be likely to inhibit –**
> **(i) the free and frank provision of advice, or**
> **(ii) the free and frank exchange of views for the purposes of deliberation, or**
> **(c) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.**

In the present context, a "qualified person" means any Minister of the Crown (s36(5)(a)).

18. The Upper Tribunal has provided valuable guidance on the proper approach to be taken when considering prejudice arguments under s36. In *Davies v IC and the Cabinet Office* [2020] UKUT 185 (AAC) a three-judge constitution offered these remarks:

> **25. There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of**

[4] See s40(2).
[5] All section numbers hereafter refer to FOIA.

public affairs are to be treated with some caution. In Department for Education and Skills v Information Commissioner and Evening Standard EA/2006/0006, the First-tier Tribunal commented at [75(vii)] as follows:

> **"In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. …**

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

> **"75. We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it…**
>
> **76. …They and other organisations engage with, or must be assumed to have engaged with, public authorities in the full knowledge that Parliament has passed the FOIA and the Secretary of State has made the EIR. Participants in such boards cannot expect to be able to bend the rules."**

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

> **"27. …The lack of a right guaranteeing non-disclosure of information ... means that that information is at risk of disclosure in the overall public interest … As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that … a person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed…**
>
> **28. …any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest.**
>
> **29. … In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way: i) this weakness, … is flawed."**

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

> **29. Section 35 of FOIA, with which the Lewis case was concerned, does not contain the threshold provision of the qualified person's opinion, but these observations by Charles J are concerned with the approach to deciding whether disclosure is likely to have a chilling effect and we consider that they are also relevant to the approach to an assessment by the qualified person of a likely chilling effect under section 36(2) and so to the question whether that opinion is a reasonable one.**
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> **30. Charles J said at [69] that the First-tier Tribunal's decision should include matters such as identification of the relevant facts, and consideration of "the adequacy of the evidence base for the arguments founding expressions of opinion". He took into account (see [68]) that the assessment must have regard to the expertise of the relevant witnesses or authors of reports, much as the qualified person's opinion is to be afforded a measure of respect given their seniority and the fact that they will be well placed to make the judgment under section 36(2) – as to which see Malnick at [29]. In our judgment Charles J's approach in Lewis applies equally to an assessment of the reasonableness of the qualified person's opinion as long as it is recognised that a) the qualified person is particularly well placed to make the assessment in question, and b) under section 36 the tribunal's task is to decide whether that person's opinion is substantively reasonable rather than to decide for itself whether the asserted prejudice is likely to occur. …**

19. By s43(2), information is exempt if its disclosure under FOIA "would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

20. Counsel agreed that the correct approach under s43 was to apply the test set out by the FTT in *Hogan and Oxford City Council v ICO* (EA/2005/0026) which poses three questions. First, what interest (if any) is within the scope of the exemption? Second, would or might prejudice in the form of a risk of harm to such interest(s) that was "real, actual or of substance" be caused by the disclosure sought? Third, would such prejudice be "likely" to result from the disclosure in the sense that it "might very well happen", even if the risk falls short of being more probable than not? (*Hogan* is, of course, not binding on me but it draws directly on high authority[6] and has long been accepted as a convenient formulation of the requirements of s43.)

21. If a qualified exemption, such as any under ss36 or 43, is shown to apply, determination of the disclosure request will turn on the public interest test under s2(1)(b), namely whether, "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in maintaining the exemption".

22. Under s50 a person aggrieved by a response to his or her request for information under the Act may complain to the Commissioner.

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[6] In particular, on the meaning of "likely", the judgment of Munby J in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin).

23. The right to appeal against a decision notice of the Commissioner is provided for under s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

> **(1) If on an appeal under section 57 the Tribunal considers –**
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> **(a) that the notice against which the appeal is brought is not in accordance with the law; or**
> **(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,**
>
> **the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.**
>
> **(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.**

24. Counsel were agreed that the proper approach to be followed by the Commissioner and any tribunal or court on any subsequent appeal is to determine the correctness (or otherwise) of the refusal to disclose as at the date of the refusal (see *APPGER v ICO and FCO* [2015] UKUT 377 (AAC) (paras 48-53), *R (Evans) v Attorney-General* [2015] AC 1787 (SC) (paras 72-73) and *Mauritzi v IC and Crown Prosecution Service* [2019] UKUT 262 (AAC) (para 184)). I agree with Mr Perry that, as these authorities tend to show (although the reasoning does not seem to be explicitly spelled out in any of them), the date of the refusal can only be the date on which the public authority gives its *final* decision on the request and accordingly, where an internal review is conducted, the date on which that process comes to an end is the material date. [7] Until that date there has been no complete and irreversible determination of the request and the response initially given is in that sense provisional. Mr Metcalfe offered no legal reasoning in support of his simple submission that the key date was that of the initial response. The logic of his position would seem to be that, for many purposes, the internal review procedure is an idle exercise because it can only be directed to the circumstances as they stood at the time of the original refusal. So, for example, fresh information (say, that the disputed material had entered the public domain since the original refusal) would have to be ignored at the review stage. This is not how I understand the review procedure to work. If it did operate in this way, it would be clearly contrary to the general policy of the law to favour internal resolution of disputes wherever possible. The Cabinet Office Code of Practice issued under FOIA, s45 (2018) includes:

> **5.8 The internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the Act. This includes decisions taken about where the public interest lies if a qualified exemption has been used. …**

[7] See to like effect *Coppel on Information Rights*, 5th ed (2020), p1106.

> **5.9 … The public authority should in all cases re-evaluate their handling of the request and pay particular attention to concerns raised by the applicant.**

Facts

25. The following uncontroversial facts emerge from the open material. For the sake of collecting the narrative in one place, I will include some detail already contained in the introduction above.

    (1) The IT systems failure took place in January 2019.
    (2) The Report was delivered in or about late April 2019.
    (3) It was not suggested that such technical material as was contained, or referred to, in the Report expanded in any way on, or departed in any way from, the content of the draft CDIO Report seen by Ms Cooper.
    (4) The Secretary of State's statement to the House of Commons was given on 18 June 2019.
    (5) The CDIO Report was shared with interested parties (including the NSP) at various stages of its development and the final version was distributed to them on or very soon after 23 August 2019. I was not shown the earlier drafts and so cannot assess how significant the changes were which it underwent during the period of its genesis. That said, it was common ground before me that the interested parties were permitted to, and did, make representations which materially influenced the content of the finished document.
    (6) The MoJ completed its review of Mr Cowling's request on 11 September 2019.
    (7) Compensation negotiations between MoJ and the NSP arising out of the January 2019 episode took place over a large part of 2019 and were concluded in January 2020.
    (8) The MoJ provided the NSP with a copy of the Report shortly after publication of the Commissioner's decision notice in March 2020. Ms Devine told me in her open evidence that the decision to share the document with the NSP was prompted by the FOIA process resulting from Mr Cowling's request. I accept that evidence.

Analysis and Conclusions

26. It is convenient to start by considering the two exemptions separately. I will then address compendiously the public interest balancing test which applies equally to each, if and in so far as any exemption is made out. I have reminded myself that, for the purposes of both stages of the reasoning, the relevant date is the date of refusal, namely the date of ultimate disposal of Mr Cowling's request, 11 September 2019.

S43(2) – prejudice to commercial interests: is the exemption engaged?

27. I take this exemption first because it was cited from the start and remained throughout the primary ground on which MoJ relied as justifying refusal of Mr Cowling's request.

28. Before the hearing the first *Hogan* question fell away. The Commissioner and Mr Cowling sensibly accepted that the MoJ could satisfy the undemanding requirement of showing that the disputed information related to the commercial interests of the MoJ and the NSP (and perhaps others).

29. Turning to the second and third *Hogan* questions[8], which I will take together, it is convenient to give separate consideration to the particular forms of alleged prejudice debated in the submissions before me.

30. First, Mr Metcalfe relied strongly on prejudice to the commercial interests of the MoJ and a particular supplier arising out of observations and recommendations about the present and future trading relationship between the two. In this regard, I am persuaded on grounds explained more fully in my Closed Reasons that material prejudice is demonstrated in relation to one part of the Report and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

31. Second, I am persuaded that Mr Metcalfe's similar prejudice argument based on observations and recommendations contained in another part of the Report is also well-founded and that the public interest favours maintaining the exemption. Here too, the argument bears on the present and future commercial relationship between the MoJ and a particular supplier.[9] Again, my full grounds are necessarily contained in my Closed Reasons.

32. My partial acceptance of Mr Metcalfe's submissions is reflected in the redactions directed in my Decision above.

33. Third, I am not persuaded by a further prejudice argument advanced by Mr Metcalfe which is related to the two points on which he has succeeded. My grounds for this conclusion are given in the Confidential Annex to these Reasons.

34. Fourth, Mr Metcalfe submitted that disclosure would be likely to prejudice the commercial interests of the MoJ by weakening its stance in its negotiations with the NSP over compensation sought in consequence of the system failure. In her witness statement (para 12), Ms Devine mentioned these negotiations

[8] Respectively, would or might the disclosure sought cause prejudice in the form of a risk of harm to commercial interest(s) that was "real, actual or of substance"? And would such prejudice be "likely" to result from the disclosure in the sense that it "might very well happen", even if the risk falls short of being more probable than not?

[9] The supplier referred to here is not the same as that referred to in para 31.

briefly but did not suggest that they would or might be prejudiced by disclosure of the Report. I see no force in this part of the Appellants' case. Rightly, Mr Metcalfe did not suggest that the Report ventured anywhere near the areas which one would expect compensation negotiations to explore. These might typically include such questions as whether the NSP had breached any contractual term and if so, which; whether the MoJ had suffered any identifiable loss and if so, in what sum or at least of what order; whether, to the extent that any loss had been suffered, it had been *caused* by any material breach; and whether any question of mitigation (or failure to mitigate) arose. What *evidential* basis does the MoJ offer for the contention that disclosure of the Report might cause material prejudice to its stance in the compensation negotiations? In my judgment, none. That stance would naturally be informed by technical, legal and managerial advice. Ms Devine in her open evidence agreed that Ms Cooper claimed no technical expertise and had drawn on the technical information in the draft CDIO Report. There was no suggestion that she had added materially to that information or deviated in any way from it, or that she had volunteered views on (or capable of bearing on) the legal issues, or any wider managerial or strategic considerations, to which the negotiations might give rise. I am not persuaded of the existence of *any* appreciable risk of real or actual or substantial prejudice to the negotiating stance of the MoJ (or, for that matter, the NSP), let alone that such prejudice was 'likely' as that word is interpreted in the authorities.

35. Fifth, the MoJ pressed wider, associated claims of prejudice based on the fact that the Report faces persons within MoJ and outside it with what may be construed as a degree of criticism. Such criticism (unsurprising given the context) *might* in some circumstances have a bearing on morale (within the MoJ and/or elsewhere), which *might* call for careful handling by managers and other decision-makers. But I see no reason to regard any criticism as occasioning a real or significant commercial risk, to MoJ or any third party. I was presented with no evidence (as opposed to mere assertion) [10] to substantiate such a risk. The exemption invoked is not there to protect against passing embarrassment. Nor does a public authority's case improve when the portentous language of 'reputational damage' is mobilised.

36. Sixth, Mr Metcalfe also relied on prejudice to the ongoing relationship between the MoJ and the NSP. The primary argument here was that the Report had always been regarded as confidential and the Department had given an assurance to the NSP that it would not release it. In those circumstances, disclosure would undermine trust. While accepting that the assurance was necessarily subject to the FOIA rights of third parties, Mr Metcalfe submitted that the very fact that it was given pointed to the sensitivity of the contents of the Report. With respect, I cannot accept that any material prejudice is demonstrated. There is no rational basis for saying that the NSP would be liable (let alone 'likely') to lose faith in the Department if disclosure of the

[10] And not even that from the NSP, which has played no part in the proceedings

Report were mandated by statute. The proposition needs only to be rehearsed to be seen as groundless. The fact that the MoJ has not called an NSP witness to attempt to make it good is less than surprising.

37. Seventh, it was submitted (as I understood Mr Metcalfe) that publication of the Report would prejudice the commercial interests of the MoJ's suppliers generally. Again, I see very little substance in this point. In so far as the 'suppliers' comprise any supplier considered above; it adds nothing to the case already examined. In so far as the 'suppliers' refer to other suppliers or potential future suppliers of the MoJ, the argument rests on mere assertion. Moreover, one would naturally have thought that at least some suppliers or potential suppliers might reasonably argue that, if anything, they were liable to be prejudiced commercially if the Report were *not* published in that its suppression might deprive them of a chance to secure a legitimate tactical advantage (in a competitive market) by comparing themselves favourably with one or more of the persons or organisations perceived to have been criticised by it.

38. For all of these reasons and those contained in the Confidential Annex and my Closed Reasons, the MoJ succeeds on the second and third limbs of the *Hogan* test, to the limited extent stated in the substituted Decision Notice, but otherwise fails.

S36(2) – prejudice to effective conduct of public affairs: is the exemption engaged?

39. The first question here is whether it was open to the MoJ to run, or the Commissioner to entertain, the "new" exemptions under s36(2). There is a clear answer. In *DEFRA v Information Commissioner and Birkett* [2011] EWCA Civ 1606, the Court of Appeal held that it is open to a public authority to raise a new exemption at any point. This is subject to the Tribunal's case management powers but there is no question of those powers being exercised here to preclude the MoJ from relying on s36(2). The subsection was pleaded in the grounds of appeal. There is no procedural irregularity or unfairness.

40. That leaves a separate question as to the proper scope of the case raised under s36(2). Two points need to be made. First, the QP's opinion, as gleaned from the submission document referred to in para 10 above, can be read as relying on s36(2)(c) only. In my judgment, however, it would not be reasonable to interpret the rushed and carelessly drafted submission in an unduly narrow and technical way. In substance, that document advanced a prejudice argument based on the assertion that disclosure of the Report and reports like it would be liable to inhibit the free and frank provision of advice (s36(2)(i)) and, probably, the free and frank exchange of views for the purposes of deliberation (s36(2)(ii)).

41. Second, the submission, while citing s36(2)(c), did not identify any alleged prejudice 'otherwise' caused. I agree with Mr Perry and Mr Cowling that, as the FTT held in *Evans v Information Commissioner & Ministry of Defence* (EA/2006/0064) (para 53), any prejudice relied on under s36(2)(c) must necessarily take a different form from prejudice under s36(2)(b)(i) and/or (ii). The word 'otherwise' means what it says. Wisely, no doubt, Mr Metcalfe did not attempt to spell out from the submission any separate, s36(2)(c) prejudice.

42. Accordingly, I proceed on the footing that an appeal under s36(2)(b)(i) and (ii) is properly before me but the MoJ's proposed appeal by reference to s36(2)(c) does not get off the ground.

43. I can well understand why Mr Cowling, supported by Mr Perry, places reliance on the inconsistent, '*ex-post-facto*' case with which he has been confronted as calling into question the reasonableness and plausibility of the QP's opinion. The procedural history might certainly be seen as lending support to a perception of a public body starting with a settled aim of suppressing inconvenient or embarrassing information and then casting around for the means by which to achieve it.[11] I prefer, however, to focus my attention on the substance of the arguments.

44. The exemptions which the QP's opinion invokes are designed to guard against prejudice to the effective conduct of public affairs consequent upon the inhibition of free and frank advice or the free and frank exchange of views for the purposes of deliberation. In para (10) of the submission document it is asserted that publication of the Report might inhibit authors of such reports from expressing themselves candidly, thereby impairing effective decision-making in public affairs. Ms Devine makes the same assertion in her witness statement (para 23). Neither the submission nor the witness statement offers any basis in evidence or reason for the notion that disclosure of the Report, or reports of a similar kind, would, or would be likely to, have any such effect. No independent support for the theory is suggested. Is it then to be accepted as a matter of simple inference that the QP (whose view is, of course, entitled to respect) must have been persuaded of its validity on grounds not explained in the evidence and documents before me? I am unable to draw what seems to me an irrational inference. It seems to me thoroughly *unlikely* that disclosure in this case would in the future cause any non-executive director, subject-matter expert or other suitably-qualified person to hesitate to accept a commission to investigate a matter of public importance, or to neutralise or 'water down' his or her findings on it. I suppose that such a person, if made aware of the (largely) successful request for disclosure of the Report, *might* proceed a little more conscious of the possibility of his or her report being published and perhaps reaching a wide readership.[12] But if so, that could only be a salutary

[11] In this regard Mr Perry drew attention to the illuminating reference in the submission document, paras 26-28 (entitled "Media Handling") to prior public criticism of the performance of some of the MoJ's online services.
[12] Although given that freedom of information legislation has been on the statute book for over 20 years, even this small psychological effect seems distinctly unlikely.

state of mind, encouraging the author to take extra care in his or her task. (In volunteering these personal reflections, I have not lost sight of the elementary fact that my views do not matter. They are relevant only in so far as they may assist me in understanding the QP's opinion and/or assessing its reasonableness.)

45. The implications of the MoJ's case on s36(2) warrant a little reflection. If the QP's opinion in this case is properly seen as reasonable, it is not easy to conceive of circumstances in which a report on a serious failure or breakdown within a public service would *not* attract exemption (subject, of course to the public interest balancing test). To say the least, this would represent an odd state of affairs in the context of an information rights scheme that begins with a presumption in favour of disclosure and transparency.

46. Having stepped back and reviewed the matter in the round, I am satisfied to a high standard that what is presented as the QP's opinion is entirely unreasonable. The stated concern, formulated by an advisor and presented in haste to the Minister, draws no support from reason, ordinary experience or common sense. Nor is even the bare *fact* of the QP's alleged concern, let alone its reasonableness, made good by evidence. The passing mention in Ms Devine's witness statement is mere assertion or, at best, a cursory and wholly unexplained expression of what *she* (not the QP) claims to believe. [13]

47. It follows that the exemptions under s36(2)(b)(i) and (ii) and (c)[14] are not engaged.

The public interest balancing test

48. On grounds given in my Closed Reasons, I hold that, to the extent that the exemption under s43(2) is engaged, the public interest in maintaining the exemption outweighs the public interest in disclosure.

49. Save as stated, I have found that the exemptions relied upon are not engaged and accordingly, the question of the public interest balancing test does not strictly arise. But in case my reasoning so far is wrong in any respect, and in deference to the helpful arguments addressed to me on that aspect, I will deal with it in any event.

50. If, contrary to my view, any relevant exemption is engaged in relation to any part of the Report (at all or to a greater extent than I have allowed), I am in no doubt that the public interest in maintaining it is overwhelmingly outweighed by the public interest in disclosure. I have five grounds.

[13] I am told nothing of the Minister's mental processes other than that he gave his approval to an appeal to the FTT based in part on the submission prepared for him.

[14] If I am mistaken in excluding s36(2)(c).

51. First, for the reasons already stated, the prejudice asserted on behalf of the MoJ was, at worst, relatively minor and the public interest in maintaining the exemption is correspondingly minor.

52. Second, the subject-matter of the Report was obviously important. The systems failure was significant and had serious consequences. And it occurred against a background of a history of IT failures across the public sector over many years.

53. Third, there were obvious public interests in understanding what had gone wrong and why, where responsibility lay, or might lie, and how best to guard against such failures in the future. If these interests in transparency and accountability were not protected, the opportunity for an informed public debate might be jeopardised and the impetus to learn lessons and make necessary changes[15] lost.

54. Fourth, I reject Mr Metcalfe's valiant submission that any public interest in transparency was met by the Secretary of State's statement to Parliament of 18 June 2019. Contrary to what is pleaded in the MoJ's Reply, para 14, that statement did not "summarise" Ms Cooper's findings at all. It was a model of opacity, conveying almost nothing bar the bald fact that three "unrelated issues" had occurred at the same time and the assurance that lessons were being learned and remedial steps taken.

55. Fifth, I agree with Mr Perry that any risk of prejudice resulting from the fact that Ms Cooper had relied on an early draft of the CDIO Report, which was later materially altered, could have been neutralised or substantially mitigated by the MoJ (and, if so desired, the NSP) issuing a statement or press release making that point.[16]

Disposal

56. For all of these reasons, I conclude that, on the grounds explained in my Closed Reasons, the appeal succeeds to the minor extent stated in my Decision above but is otherwise without merit. The disputed information must be disclosed, subject to redactions which I have explained in my Closed Reasons and, as agreed, subject to redaction of the name of the junior civil servant mentioned at the end of the Report.

57. It has been necessary to present part of my reasons adverse to the MoJ's appeal in a Confidential Annex. If there is no appeal (from any quarter) against my

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[15] That there was a need to learn lessons and implement change was acknowledged in the Secretary of State's statement of 18 June 2019.

[16] The CDIO Report was completed and shared with the NSP about three weeks before the MoJ finally disposed of Mr Cowling's internal review application (11 September 2019). And if it matters, it seems to be uncontroversial that, even by the date of the initial refusal (22 July 2019), the content of the draft CDIO Report was materially different from that of the draft seen by Ms Cooper.

Decision, there will be no justification for further confidentiality. Accordingly, having regard to the 28-day time limit for applying for permission to appeal, I have directed that the Confidential Annex be sent to the parties and otherwise made public in the usual way 42 days after my Decision and Open and Closed Reasons are sent to the parties. The extra 14 days will be ample time for the Tribunal (or, as the case may be, the Upper Tribunal) to react to any application (by any party) and, if appropriate, extend the period of confidentiality and further delay the promulgation of the Annex.

58. Finally, I would add two short observations. First, at the end of this appeal I cannot help wondering about the substantial cost in time and public resources which it has entailed. The MoJ owes its small success to the fact that the Tribunal must base its assessment on the circumstances as they stood at the time of the public authority's refusal. As Mr Metcalfe acknowledged in his closing submissions, were a fresh request to be made now, the case would look very different. Second, for the avoidance of any doubt, I would have arrived at the same decision, for the same reasons, if I had been persuaded that the date of refusal was properly fixed at 22 July, rather than 11 September 2019. I *might* have accepted that some arguments about prejudice to commercial interests (particularly that said to result from any (perceived) criticism of any relevant entity) *might* have carried marginally more weight in July, when the CDIO Report was still in preparation, than in September, but any difference in assessment would have come nowhere near to leading me to a different outcome on the application of s43(2) or on the public interest balance.

Anthony Snelson

Judge of the First-tier Tribunal
Date: 25 March 2021

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2020/0136V

Heard by CVP on 9 February 2021

Before

JUDGE ANTHONY SNELSON

Between

MINISTRY OF JUSTICE

Appellants

and

THE INFORMATION COMMISSIONER

First Respondent

and

MR PATRICK COWLING

Second Respondent

CONFIDENTIAL ANNEX TO OPEN REASONS

Introduction

1. This Confidential Annex should be read with my Decision and Open Reasons of even date[1], in which I explain my grounds for holding that, subject to certain redactions to paragraphs 12A and 12C, the disputed information ('the Report') must be disclosed in full. The summary of the background and applicable law in the Open Reasons will not be repeated. The terminology and abbreviations used there will be adopted here.

[1] I will adopt here the vocabulary and abbreviations used in those Reasons.

2. In my Closed Reasons of even date, I explain my grounds for holding that the information to be redacted is exempt under s43(2) and the public interest in maintaining the exemption outweighs the public interest in disclosure.

3. In this Confidential Annex, I explain my grounds for holding that disclosure of the Report should not be subject to any redaction of paras 9 or 10. It is necessary to set them out in this Annex because my reasoning cannot be adequately explained without trespassing on, or venturing perilously near to, closed material. I do not deal with other parts of the Report here because my grounds for ordering their disclosure in full are sufficiently explained in my Open Reasons.

Paras 9 and 10 – engagement of s43(2)

4. Mr Metcalfe, counsel for the MoJ, argued strongly that disclosure of material in para 9 and, to a lesser extent, para 10 of the Report engaged s43(2) because its content was directed to the contractual relationship between the MoJ and a key supplier, Atos, and that the risk of prejudice resulting from such disclosure was particularly acute given that their current contract was due to be renegotiated in the autumn of 2019[2].

5. The main points made in paras 9 and 10, contained within the 'Findings' section of the Report, can be summarised in this way.

    (1) The 2016 contract between the MoJ and Atos was, from the Department's point of view, poorly structured in that it made no explicit provision for 'live monitoring' of capacity and incidents, putting the Department in a weak position in the event of systems failures such as those of January 2019. That was a regrettable state of affairs.
    (2) Even under the limited terms of the contract, Atos failed to provide the monitoring services required of them.
    (3) Had Atos carried out the monitoring required of them, the second and third of the three systems failures might have been averted.
    (4) The MoJ's difficulties in reacting to the systems failures were compounded by its own deficiencies in such areas as organisation, IT governance, communication and risk planning.
    (5) The MoJ was already (ie by April or May 2019, when the Report was completed) taking (specified) steps to address the disadvantage stemming from the poor structuring of the contract, but these were not a substitute for a 'live monitoring' service.

6. Once paras 9 and 10 are carefully analysed, it is apparent that most of the content consists of a combination of primary ('what?') and secondary ('why?') findings. Items (2) to (5) fall into that category without qualification. In my judgment, there is no reason to treat them differently from the other narrative

[2] It seems that the current contract expired in October 2019.

and evaluative findings in the Report. I can well understand why the MoJ was anxious to keep Ms Cooper's critical comments out of the public eye but I have explained in my Open Reasons my view that, embarrassing and uncomfortable as they may be (for the Department and Atos), they do not engage s43(2).

7. Item (1) is arguably in a slightly different class from items (2)-(5). It does involve direct comment on the structure of the contract between the MoJ and Atos and Mr Metcalfe understandably stressed the impending renegotiation. I accept that there would have been a degree of sensitivity within the MoJ (and, no doubt, Atos) about publication of any independent comments on the contract and its structure and that any sensitivity may have been heightened somewhat given the context of the events of January 2019 and the fact that the contract was due for renewal within a matter of months of the Report being completed. But the fact that the subject might have been delicate and the remarks uncomfortable does not warrant the conclusion that any real prejudice was occasioned. In the end, the item (1) findings were merely further evaluative statements critical of the way in which the MoJ had managed its IT interests. I do not accept that their publication in the summer or autumn of 2019 would have told Atos anything not already obvious from the context or left the Department hamstrung in discussions about renewal of the contract. In light of the events of January 2019 and a history of many months' of debate over drafts of the CDIO Report and negotiation over compensation, it would surely have been plain and obvious to Atos that the MoJ would enter discussions about any renewed contract with a shopping list of fresh terms to afford them better protection against systems failures. And it would have taken little reflection to spot that improved defensive measures (for example, 'live monitoring') would be likely to feature high on the list. The idea that disclosure of anything in paras 9 or 10 could have given Atos an unfair advantage in the negotiations is, in my view, fanciful.

8. Nor do I accept that disclosure of paras 9 and/or 10 in the summer or autumn of 2019 would have prejudiced the MoJ vis-à-vis any other potential future supplier. Given that much information about the events of January 2019 and its effects was (inevitably) in the public domain, any rational and reasonably well-informed bidder for any part of its IT business would in any event have entered into negotiations (in autumn 2019 or at any time thereafter) alive to the likelihood that the contract would not be won without it being prepared to shoulder significant obligations designed to protect the Department against future service failures.

9. I *might* have seen the item (1) question differently had paras 9 and 10 included specific *advice* as to how the anticipated renegotiation should be approached. I can see that a party to commercial negotiation (essentially a quasi-adversarial process) might be embarrassed if relevant tactical advice which it had received were made public. But the passages under consideration here cannot sensibly be read as recommending any particular negotiation stance or strategy. They

point to the danger of being left commercially exposed but go no further than that.

10. For these reasons, I am satisfied that paras 9 and 10 do not engage s43(2). Neither the second nor the third limb of the *Hogan* test is satisfied.

Paras 9 and 10 – application of the public interest balancing test

11. In case I am mistaken and s43(2) is to any extent engaged, I am satisfied to a high standard that the public interest in disclosure of the information in paras 9 and 10 outweighs any public interest in maintaining the exemption. I rely on the grounds set out in my Open Reasons, paras 51-54, which I will not repeat.

Anthony Snelson

Judge of the First-tier Tribunal
Date: 25 March 2021