NCN: [2023] UKFTT 426 (GRC)
Case Reference: EA-2021- 0249

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP

Heard on: 18 May 2022, panel deliberations on 23 May 2022
Decision given on: 08 September 2022

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PAUL TAYLOR
TRIBUNAL MEMBER EMMA YATES

Between

MELANIE NEWMAN

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) THE CROWN PROSECUTION SERVICE

Respondents

Representation:
For the Appellant: Naomi Cunningham (Counsel)
For the First Respondent: Not in attendance
For the Second Respondent: Jennifer Thelen (Counsel)

Decision: The appeal is dismissed. The CPS was entitled to rely on s 36(2)(b)(ii) to withhold the requested information.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-72577-F0S7 of 26 August 2021 which held that the Crown Prosecution Service (the CPS) was entitled to rely on s 36(2)

(b(ii) (disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation).

2. The Commissioner found procedural breaches of s 10(1), s 17(1) and s 17(3).

3. The Commissioner did not require the public authority to take any steps.

Factual background to the appeal

4. The CPS originally launched a LGBT+ schools pack in 2012/2013. In 2018 the CPS undertook to refresh the schools pack as part of a cross Government Hate Crime and LGBT action plan.

5. On 21 January 2020 the CPS published a refreshed version of a guidance pack for schools on homophobic and transphobic bulling and hate-crime ('the Schools Pack'). On 30 April 2020 the CPS agreed to withdraw the Schools' Pack pending a detailed review of its content. The Schools' Pack was permanently withdrawn on 1 September 2020 following the receipt of several Judicial Review Pre-Action Protocol letters relating to the Schools Pack.

Requests, Decision Notice and appeal

The request

6. This appeal concerns the following request made on 1 July 2020:

> This is a request under the Freedom of Information Act for information relating to the CPS LGBT hate crime schools resource pack launched in January 2020 which was withdrawn following a threat of legal action.
>
> Please could you provide:
>
> (a) Copies of all communications between the CPS, Gendered Intelligence and Stonewall in 2019 relating to this pack. If this is too broad I suggest the CPS limit its search to the individual(s) in the CPS charged with overseeing its development.
>
> (b) Copies of any internal complaints or comments received after the report's launch and subsequent negative publicity. Again, if necessary please restrict your search to the individual(s) who would be expected to receive and respond to these complaints who I anticipate would be the same individual(s) as in a).
>
> (c) Copies of any internal discussions amongst senior CPS management relating to the legal threat and subsequent publicity, subject to legal privilege i.e. I do not expect to be passed details of legal advice received.

The response

7. The CPS replied on 1 October 2020. It denied that it held the information requested in (b). In relation to (a) and (c) the CPS relied on s 36(2)(b)(ii) to withhold the information on the basis that, in the reasonable opinion of the qualified person ('QP'), disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. The QP was the DPP. The first opinion relied on is dated 25 September 2020.

8. The CPS upheld its decision on internal review on 30 November 2020. As part of this process a further submission was made to the DPP on 20 November 2020 and the CPS relies on a further opinion on 26 November 2020.

9. In preparation for these proceedings a further opinion was sought in March 2022.

The Decision Notice

10. In a decision notice dated 26 August 2021 the Commissioner decided that the CPS had obtained the opinion of the QP, that opinion was reasonable and that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Commissioner determined that there had been procedural breaches of s 10(1), 17(1) and 17(3) FOIA but ordered no further steps to be taken.

Notice of Appeal

11. The amended grounds of appeal are as follows:

    (i) Inadequate explanation of finding that the QP's opinion was reasonable

    (ii) Inadequate reasons – public interest

    (iii) No separate consideration of the public interests in relation to different requests

12. The tribunal exercises a full merits view. In the light of written and oral submissions, it is clear to the tribunal that the decision is challenged, in essence, on the basis that:

    12.1. The Commissioner was wrong to conclude that the exemption was engaged because the QP did not give an opinion on the statutory question and his opinion was not reasonable.

    12.2. The Commissioner was wrong to conclude that the public interest favoured disclosure.

The ICO's response

Ground One

13. The Commissioner asserts that para 6.v of the amended Grounds of Appeal is the sole independent ground of appeal under Ground 1, namely that the Commissioner failed to consider, or to consider whether the QP had had regard to, the inherent weakness of the "chilling effect' argument referred to by the Upper Tribunal in **Davies v Information Commissioner** [2019] 1 WLR 6641.

14. The Commissioner submits that the effect of **Davies** is overstated. The Commissioner recognises that when considering chilling effect arguments, a reasoned and evidence-based case needs to be made to support the conclusion that a chilling effect would occur and what its effect would be. However chilling effect arguments should not be discounted unduly because s 36(2)(b)(ii) calls for consideration of the risk of inhibition as part of the public interest considerations.

15. The Commissioner properly considered the inhibiting effect of disclosure, rather than the content of the requested information itself. The Commissioner did not assume a chilling effect

necessarily arose - she considered the chilling effect on the facts. At para 31 of the Decision Notice she stated that whether it is reasonable to think that a chilling effect would occur will depend on the circumstances in each case including the timing of the request, whether the issue is still live and the actual content and sensitivity of the information in question. The Commissioner gave due consideration as to why the withheld information was sensitive, noting at the time of the request that the Pack had not yet been withdrawn and that litigation was ongoing.

Ground Two

16. Any inadequacy in reasons can be cured by the tribunal considering the application of s 36(2)(b)(ii) afresh. The six examples given under Ground 2 lack merit in any event.

Ground Three

17. The Commissioner's consideration of the public interest test was lawful in the circumstances. The Commissioner properly accepted the CPS' submissions that the effects of disclosure of either strand of the request would have the relevant effect.

Response of the CPS

18. The CPS and the Commissioner correctly applied s 36(2)(b)(ii). The QP's opinion reasonably and rationally recognised that the disclosure of the disputed information would be likely to lead to prejudice. There is a real public interest in maintaining the exemption given that the prejudice goes to a key function of the CPS, namely the development of guidance, including with external stakeholders.

19. The grounds of appeal proceed on three false premises:

    19.1. That there is a fundamental distinction between internal and external communications in assessing the application of s 36(2)(b)(ii). The Commissioner and the tribunal are considering the impacts of those communications.

    19.2. The nature of the task when considering the impact on future free and frank deliberations is a forward looking, predictive and evaluative exercise. While the analysis is granular and based on the information it is not a matter of looking at each aspect of the information and determining specifically the who, what, how and when disclosure could impact on future deliberations.

    19.3. The submissions do not reflect the fact that the Commissioner cannot make all her reasoning public.

20. The opinion of the QP satisfies the threshold test of rationality. The disputed information and the relevant arguments were placed before the DPP. These documents, together with the DPP's own knowledge and experience, were relied on in reaching the section 36 opinion. The DPP reviewed his opinion at the internal review stage, and specifically took into account the concerns raised by the appellant.

21. There was no need for the DPP to consider the impact of disclosure of the two strands of the request. **Davies** does not reflect an inherent weakness in the chilling effect argument, it

reflects a common sense proposition that the assertions of a chilling effect are to be treated with caution and be properly tested by the decision-maker.

22. The CPS accepts the public has an interest in understanding policy development, and the role of external stakeholders in policy development. That interest will be higher on issues of significant public concern. The CPS does not dispute that the issue of the nature of the guidance provided to schools around bullying, and hate crimes, and in particular how that guidance should address LGBT+ rights, is an issue of significant public concern.

23. There is a strong interest in maintaining the exemption:

    23.1. The disputed information goes to the heart of the exemption provided by section 36 insofar as the deliberations at issue concern CPS policies.
    23.2. The disputed information relates to an extremely sensitive topic.
    23.3. The DPP's reasonable opinion that the risk of prejudice was real must be factored in to the balance.
    23.4. It is vital that CPS staff are able to freely and frankly exchange views, in the course of deliberations surrounding the review of policies and guidance. To the extent the safe space for these deliberations is minimised, or a chilling effect occurs, it will impact negatively on future deliberations, and ultimately decision-making.
    23.5. A further key concern is for CPS staff to be able to freely and frankly provide their views in the context of discussions with external stakeholders, given that the CPS is required to work across a wide range of stakeholders to deliver justice for victims of crime.
    23.6. The public interest arguments are common to both strands.
    23.7. To the extent that the released information would only reveal a portion of the narrative the CPS would have to spend time and effort providing further information.
    23.8. There is no need to make a specific finding on the severity, extent or frequency of the impact.

24. In the event that the primary argument on s 36 is not accepted the CPS relies on s 40(2) in relation to any personal data.

Evidence

25. We have read and taken account of an open and a closed bundle of documents. We read an open and two closed witness statements and heard evidence from Graham Ritchie, Deputy Director in the Strategy and Policy Directorate (SPD) of the CPS. We took account of one further closed witness statement which explains the nature of any redactions and the circumstances in which the latest opinion of the QP was sought.

26. We have taken account of all the evidence in the witness statements and given orally.

Closed session

27. The tribunal heard part of the evidence and submissions in closed on the basis that it was necessary to avoid defeating the purpose of the proceedings. The following gist of the closed session was prepared by the CPS and agreed with the tribunal:

> Mr Ritchie ("GR") gave his evidence in CLOSED.
> First, he gave examples, regarding the impacts on stakeholder relationships and engagement.

Next, GR was asked about the way in which the safe space/chilling effect arguments applied to the content here (the withheld information). He explained that the sensitive nature of the topic which distinguishes this case from the typical case of policy making which would, in the ordinary course, not fall within the s.36 exemption.

GR reiterated that once the Schools Pack was withdrawn, ongoing discussions with stakeholders continued. He stated his concern that stakeholders would think twice about how they would work with the CPS given concerns over how communication is handled going forward. The expectation that there was scope for private conversations, or conversations in a safe space, would have been damaged to the detriment of CPS policy making.

GR was asked about the submissions to the QP. He explained that the DPP is accustomed to receiving these requests, and therefore it would not need to be highlighted specifically. The written reply would not represent the totality of the thinking of the DPP.

GR was asked about the "Media Interest" section of the submission (p.194 of the Supplementary Bundle). He explained that this was a standard section for any submission to the DPP.

Counsel for the CPS, Jennifer Thelen made submissions in CLOSED. She took the tribunal through the CLOSED versions of the QP submissions, and the opinion of the QP given in response, and the CLOSED witness statement, and highlighted the evidence which was relevant to the two-stage analysis required under s.36 (the reasonableness of the QP opinion and the public interest test). She took the tribunal through relevant examples in the CLOSED material.

Legal framework

S 36(2)(b)(ii)

28. Section 36(2)(b)(ii) provides:

> 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 –
>
> …
>
> (ii) the free and frank exchange of views for the purposes of deliberation,

29. A 'qualified person' for the purposes of this appeal is defined in s 36(5)(o) as any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown. In this appeal it is the DPP.

30. The tribunal's role is to decide whether the opinion is substantively reasonable rather than to decide for itself whether the asserted prejudice is likely to occur.

31. In IC v Malnick and ACOBA [2018]AACR 29 the Upper Tribunal said:

28. The starting point must be that the proper approach to deciding whether the QP's opinion is reasonable is informed by the nature of the exercise to be performed by the Q and the structure of section 36.

29. In particular, it is clear that Parliament has chosen to confer responsibility on the QP for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect. As Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55):

> "It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the tribunal's own assessment of the matters to which the opinion relates."

…

47. The information tribunal in *Guardian Newspapers and Brooke* then went on to set out how the question of "reasonable opinion" should be approached under section 36(2). It said:

> "54. The first condition for the application of the exemption is not the Commissioner's or the tribunal's opinion on the likelihood of inhibition, but the qualified person's "reasonable opinion". If the opinion is reasonable, the Commissioner should not under section 36 substitute his own view for that of the qualified person. Nor should the tribunal.
>
> 60. On the wording of section 36(2) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable We do not favour substituting for the phrase "reasonable opinion" some different explanatory phrase, such as "an opinion within the range of reasonable opinions". The present context is not like the valuation of a building or other asset, where a range of reasonable values may be given by competent valuers acting carefully. The qualified person must take a view on whether there either is or is not the requisite degree of likelihood of inhibition. We do, however, acknowledge the thought that lies behind the reference to a range of reasonable opinions, which is that on such matters there may (depending on the particular facts) be room for conflicting opinions, both of which are reasonable."

48. All parties before us agreed that, when the tribunal is considering the substance of the QP's opinion, this passage sets out the correct approach.

49. However, the information tribunal in *Guardian Newspapers and Brooke* went on to find that an opinion must be judged not only with regard to its substantive reasonableness but also as to its procedural reasonableness. It said:

> "64. On this point we consider that the Commissioner is right, and that in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at. We derive this conclusion from the scheme of the Act an the tenor of section 36, which is that the general right of access to information granted by s 1 of the Act is only excluded in defined circumstances and on substantial grounds. The provision that the exemption is only engaged where a qualified person is of the reasonable opinion required by section 36 is a protection which relies on the good faith and proper exercise of judgment of that person. That protection would be reduced if the qualified person were

not required by law to give proper rational consideration to the formation of the opinion, taking into account only relevant matters and ignoring irrelevant matters. In consideration of the special status which the Act affords to the
opinion of qualified persons, they should be expected at least to direct their minds appropriately to the right matters and disregard irrelevant matters. Moreover, precisely because the opinion is essentially a judgment call on what might happen in the future, on which people may disagree, if the process were not taken into account, in many cases the reasonableness of the opinion would be effectively unchallengeable; we cannot think that that was the Parliamentary intention."

52. We agree that one only has to pause to think through the consequences of the approach adumbrated in paragraph 64 of Guardian Newspapers and Brooke (set out above) to realise that it cannot be right. If a defect in the process by which the opinion was reached would mean that the opinion was not reasonable, the result would be that information would have to be disclosed even though the opinion appears to be correct in substance and where the consequences of disclosure would be very serious prejudice within section 36(2) and where there was no sufficient countervailing public interest in disclosure. Such an outcome militates against the purpose of FOIA which is concerned with matters of substance not process. We agree with Ms Stout that Parliament cannot have intended that a procedural failing could of itself prevent the public authority from successfully protecting the public interests encompassed by section 36.

53. We also agree with Ms Stout that importing procedural requirements in relation to the QP's opinion at the gateway stage, with the result that an opinion which is in substance reasonable may yet be found to be unreasonable because of a procedural failing, may lead to other bizarre and unintended consequences.

54. First, it would mean that the decision-making process requirements are more demanding at the initial gateway stage than they are at the substantive stage of considering the public interest balancing test. Yet given that all relevant interests are protected by the full merits determination required in applying the public interest balancing test, it makes little sense to have a more rigorous procedural test at the initial stage.

55. Second, Parliament has plainly decided that the threshold question is a matter for the QP. If, however, a procedural error prevents a public authority from relying on section 36, then (absent any other exemption applying) the disputed information must be disclosed, whatever the potential prejudice. By contrast, in a conventional judicial review scenario, the quashing of a public authority's decision for procedural error would have typically resulted in it being allowed to take the decision again.

56. For these reasons, we conclude that "reasonable" in section 36(2) means substantively reasonable and not procedurally reasonable

32. In considering whether a qualified person's opinion that there would, in essence, be a 'chilling effect' is substantively reasonable, the tribunal is assisted by the following paragraphs from the Upper Tribunal decision in **Davies v IC and The Cabinet Office** [2019] UKUT 185 (AAC):

24.In *Information Commissioner v Malnick and The Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC), a three judge panel of the Upper Tribunal held at [56] that section 36(2) of FOIA is concerned with substantive rather than procedural reasonableness of the qualified person's opinion.

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 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. These are highly- educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department's position, whether or not it is their own."

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.

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. Mr Lockley agreed that the considerations identified by Charles J were relevant. We acknowledge that the application of this guidance will depend on the particular factual context and the particular factual context of the *Lewis* case, but that does not detract from the value of the approach identified there.

33. S 36 is a qualified exemption, so that the public interest test has to be applied. In weighing the public interest the opinion of the QP gives weight to the arguments for withholding the information, but the tribunal can consider the severity, extent and frequency of the prejudice or inhibition.

The role of the tribunal

34. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Submissions

Appellant's submissions

35. The Appellant submits that the question of how a radically flawed schools pack came to be published by the CPS is a matter of urgent and legitimate concern. The organisations consulted were limited to a group of like-minded organisations who all took closely aligned approaches. Dissenting voices were excluded from the consultation process, whether deliberately or through ignorance.

The opinion of the QP

36. There is nothing in the submissions to the DPP which show that his mind had been properly directed to the question that he is required to address. He agrees to withhold, but does not address his mind to the statutory threshold question or give his opinion that the threshold question is satisfied. He recommends that the balance of public interest favours disclosure, which is a different question.

37. There was no material before the DPP capable of founding a reasonable opinion that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation, either in relation to external or internal communications.

38. The evidence in Mr. Ritchie's witness statement amounts to no more than an assertion that the CPS should be able to engage with stakeholders in private, or that the CPS should be exempt from FOIA by its nature. The schools pack was published in January 2020. The need for a safe space would have long since expired by the time the request was made.

39. Mr. Ritchie's evidence on the issue being live amounted to no more than that the stakeholders were still upset and the fact that the debate was sensitive, with both sides feeling very strongly, and was attracting a lot of public and press interest. The debate has become toxic and heated, but it is unclear why this should mean that the CPS must be allowed to consult with one side without scrutiny from the other.

40. As in **Davies** the basis of the likely chilling effect is no more than a statement that disclosure was likely to have that effect devoid of any reasoning why. Any chilling effect is simply the effect the existence of FOIA could be expected to cause, and should be very minor because of the expectations that civil servants will act with professionalism, courage and independence. External groups, if they are worth consulting, should be equally robust. There should have been separate consideration by the QP of whether there was likely to be an effect on internal and external discussions.

The public interest balance

41. The tribunal was asked to consider:
    41.1. The severity, extent and frequency of any inhibition;
    41.2. In what factual scenarios the inhibition may be expected to operate;
    41.3. How and why any chilling effect or safe space arguments apply
    41.4. The extent to which the issue was still genuinely live at the date of the decision
    41.5. The relevance of the fact that the issue remained topical and sensitive
    41.6. The public interest in exposing excessive influence on public authorities by lobby groups and/or one sided engagement by public bodies on contentious matters of public policy and in inhibiting lobbyists from giving bad or misleading advice by the knowledge that their advice will be subject to public scrutiny.

42. The appellant relied on a number of first tier tribunal decisions as instructive as to the kinds of circumstances that justified withholding information in the public interest.

43. Immediacy is needed in relation to a safe space for the incubation of policy. It does not provide permanent long term safety from any kind of scrutiny. The timing of the decision is crucial. By the time of the decision the schools pack had been permanently withdrawn.

44. It is understandable that the CPS is reluctant to have details of its engagement with a restricted set of stakeholders scrutinised. People will be critical of that process but that is a healthy state of affairs.

45. The only 'sensitivity' of this issue is that people feel strongly about it. That is not what sensitive means for the purposes of the public interest in withholding information.

46. The result of the consultation process was a document riddled with serious flaws which had to be withdrawn at the first intimation of judicial review proceedings. If a more open consultation had been conducted with a wider group of stakeholders, those flaws might have been identified at an earlier stage. The deficiencies of the pack provide powerful evidence that the public interest would be better served by openness.

The Commissioner's written submissions

47. The Commissioner made two points about para 31.3 of the CPS' amended response as follows. First, in **Davies,** the Upper Tribunal did not reject the 'inherent weakness' observation of Charles J in **Lewis**, rather the Upper Tribunal clarified that it carried less weight in the face of 'appropriately detailed identification, proof, explanation and examination of the likely harm or prejudice'. Second, the Commissioner clarified that the Commissioner does not have to repeat the substance of the QP's inquiry under s 36(ii).

Open submissions by the CPS

48. The submission to the QP squarely set out the statutory test and it would have been obvious to the DPP what he was being required to address. Alternatively, if the submissions are read pragmatically and as a whole there can be no real doubt that the QP was of the opinion that the free and frank exchange of views for the purposes of deliberation was likely to be inhibited.

49. The Appellant's submissions on the QP's opinion suffer from the same flaw as the FTT's decision overturned by the Upper Tribunal in **Malnick**. The correct outcome should not be vitiated by a technical error (see para 51-56 of **Malnick**). If it was reasonable to conclude that prejudice was likely to arise from disclosure, it would be wrong if disclosure was to follow from a flaw in the approach of the QP or the way in which the question was put to him. The tribunal is engaging in a full merits review and is likely to have more evidence before it than was before the QP, but it is the substance of the opinion that is being assessed, so the reasonableness of the opinion is tested against the evidence before the tribunal.

50. Although it is an error for the tribunal to require the QP to evaluate more than is required for the threshold test, it is not an error for the QP to go on to consider the public interest. This is anticipated by the Commissioner's guidance.

51. The QP is aware of the context in which CPS are working and he is aware of the sensitivities engaged. He had seen the underlying material and had had the 'inherent weakness' point specifically drawn to his attention.

52. Both chilling effect and safe space arguments can apply to external and internal communications.

53. The following factors were said to be relevant to both the reasonableness of the opinion and to the public interest balance.

54. The policy was still relatively live in October 2020:

    54.1. CPS officials were still engaged in difficult conversations with the Hate Crime ECG (Hate Crime External Consultative Group). The policy was very much live in terms of how the withdrawal of the CPS schools pack would be managed and how stakeholder relationships would be managed.
    54.2. The decision to withdraw the schools pack permanently had been taken but that decision did not stand alone. The CPS still had to address the underlying issues and still has to work with local communities and third party sectors to develop its approach to supporting victims and tackling hate crime.
    54.3. There is the general requirement of further stakeholder engagement. There are wider issues around working and developing policy approaches on sensitive topics. That work is ongoing.

55. In terms of the content of the information, two aspects of CPS policy are engaged. First the sensitive policy decision around the withdrawal of the schools pack and secondly consulting with stakeholders about the development of the pack. The chilling effect is not just the effect on a generic free space for ideas and open and honest policy discussion. It is the freedom to have an open and honest discussion with stakeholder groups in order to fully understand their positions in this particular case and on these particular facts and at this particular stage in the process. This was in the early stage of the processes where there is a need for an open and honest atmosphere when information was being gathered which could be tested later. If this was disclosed there would be risk that next time a less open approach might be taken at the information gathering stage.

56. The respondent is not advancing the argument that the CPS would always be entitled to a safe space when engaging with stakeholders.

57. The subject remains a topical and sensitive one. It is relatively easy to see how disclosure would inhibit CPS staff in their deliberations and their ability to express themselves honestly and openly when asking questions about this particular topic and putting forward their views when those views, if made public, might be treated as definitive positions.

58. There are particular difficulties about communication and transgender issues given the polarised debate. The norms for the public debate are developing. The CPS wants to advance policies that promote its role as an effective and independent prosecutor. Disclosure of these communications could lead to the CPS being required to engage in a substantive debate and criticised for conduct which is not at the core of their policy making.

59. Mr. Ritchie explained how this extended to other highly sensitive issues including hate crime and violence against women and girls.

60. The public interest in disclosure is relatively minimal. There is a public interest in transparency and accountability. A number of the factors relied on by the Appellant do not point in favour of disclosure:

60.1. The fact that the CPS worked with Stonewall was in the public domain.
60.2. At the time, CPS engagement with Stonewall and Gendered Intelligence was routine.
60.3. The fact that Stonewall has since come under scrutiny is not relevant.
60.4. Disclosure is not needed to challenge the nature of the process and the groups selected. That can be done by a FOIA request asking the CPS who they consulted.
60.5. Any flaws in the schools pack are irrelevant, other than the fact that it was a contentious issue which feeds in to the public interest in transparency.
60.6. The strong public interest in a decision is not necessarily served by disclosure of the precise content of the emails which precede that decision.

Discussion and conclusions

61. The QP gave his opinion on 3 occasions:
    61.1. In response to a submission dated 15 September 2020
    61.2. In response to a submission dated 30 November 2020
    61.3. In response to a submission dated 29 March 2022

62. It is extremely unfortunate and surprising in an organisation such as the CPS, that the submissions do not explicitly direct the DPP to answer the required statutory threshold question. The submission asks the DPP to 'approve the withholding of the material' and explicitly highlights the public interest factors that have been taken into account.

63. The requirement under s 30(1)(ii)(b) is for an opinion by the QP on whether or not the section is engaged. The QP is not required to give an opinion on whether or not the information should be withheld or whether the public interest favours disclosure. Either the person drafting the submission was unaware of this, or the submission was badly drafted.

64. It is not our role to consider the process by which the opinion is reached. As the Upper Tribunal highlighted in ***Malnick***, at paras 54 and 55:

    64.1. The decision-making process requirements should not be more demanding at the initial gateway stage than they are at the substantive stage of considering the public interest balancing test. All relevant interests are protected by the full merits determination required in applying the public interest balancing test. It makes little sense to have a more rigorous procedural test at the initial stage.
    64.2. Parliament has decided that the threshold question is a matter for the QP. If a procedural error prevents a public authority from relying on section 36, then (absent any other exemption applying) the disputed information must be disclosed, whatever the potential prejudice. By contrast, in a conventional judicial review scenario, the quashing of a public authority's decision for procedural error would have typically resulted in it being allowed to take the decision again.

65. Having made these observations, we turn to the question of whether we have before us evidence which allows us to conclude that the opinion of the QP was that disclosure of the information would or would be likely to prejudice the free and frank exchange of views for the purposes of deliberation.

66. The QP adopted the reasoning in the submission dated 15 September 2020. He agreed 'to withhold, pursuant to s36(2)(b)(ii), 'for the reasons given'. Those reasons included the following at para 15:

> CPS staff should feel able to express themselves openly, honestly and completely in providing their views as part of the process of deliberation and should feel confident that there is a safe space to air their views, debate live issues and reach decisions. **This process is likely to be inhibited** if it became known that internal email discussions could be released into the public domain at a later date under a FOI request. (our emphasis)

67. In our view, the QP's conclusion that the information should be withheld 'for the reasons given' implicitly rests on the QP having formed the opinion that there was likely to be inhibition as set out para 15. We do not accept that there is a requirement that the opinion be expressed in a particular way, for the reasons given in **Malnick**.

68. For similar reasons, we do not accept that the fact that the QP was asked to and did express an opinion on the public interest balance vitiates the QP's opinion. It is clear from Malnick that our role is to assess the substantive reasonableness of the opinion, not the process by which that opinion was reached.

69. We then move on to the substantive reasonableness of that opinion.

70. In determining if the opinion is substantively reasonable, in our view we are entitled to take account of all the evidence before us today even if that was not before the DPP when he formed his opinion. This follows from the Upper Tribunal decision in **Malnick.**

71. If that were not the case, if the opinion was not reasonable because some of the evidence before the tribunal was not before the QP, the result would be that information would have to be disclosed even though the opinion appeared to be correct in substance and where the consequences of disclosure would be very serious prejudice within section 36(2) and where there was no sufficient countervailing public interest in disclosure.

72. In any event, in addition to the submissions the QP reviewed the withheld information and, as the DPP, would be likely to have had personal knowledge of the matters highlighted to us in evidence in the tribunal hearing such as sensitivity and timing.

73. We find that the opinion of the QP that disclosure of the requested information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation was reasonable for the following reasons.

74. When considering the QP's opinion we take into account the fact that he is well-placed to make the assessment and we take account of his level of seniority.

75. In assessing the substantive reasonableness of the opinion, we bear in mind that a degree of circumspection about reliance on a 'chilling effect' is justified where there is simply an assertion that that is what will occur. We bear in mind that civil servants can be expected to act with courage and independence.

76. This does not mean that the threshold can never be discharged (particularly given the low degree of likelihood required), nor that it cannot properly be discharged on the basis of evidence setting out the basis of the view that such a chilling effect will occur (see para 138 **DfT v ICO and Alexander** [2021] UKUT 327 (AAC)).

77. Further we note that the purpose of s 36(2)(b)(ii) is to protect the free and frank exchange of views for the purpose of deliberations. It is intended to avoid a 'chilling effect' on that free and frank exchange of views.

78. The response to the request was given in October 2020. At that stage the decision had been taken, definitively and permanently, to withdraw the schools pack. There was no intention to produce an amended version. Accordingly there was no ongoing risk of inhibition on deliberations regarding (i) whether or not to take the decision to withdraw the schools pack or (ii) the content of any future version of the schools pack.

79. However, a number of matters remained live in October 2020. Discussions were ongoing as to how the CPS should manage stakeholder relations in the light of the withdrawal of the schools pack. The CPS were holding discussions with stakeholders about the decision to withdraw. The DPP email of 25 September 2020 also notes that judicial review proceedings had been commenced 'earlier that week'.

80. The CPS had an ongoing role in relation to policy development in this area. The CPS still had to address the underlying issues. It still had to work with local communities and third party sectors to develop its approach to supporting victims and tackling hate crime.

81. This topic is particularly sensitive in a number of ways. The norms are constantly changing. The goalposts of acceptability shift very rapidly. Language is sensitive, contested and constantly evolving:

> Questions have been raised around coverage in the press, with community groups and other interested parties seeking to influence how the subject is covered, including the terms, approaches and definitions that are considered acceptable. While it is normal for parameters that determine acceptable ways of treating a subject to evolve over time in line with changes in social attitudes and behaviours, the goalposts of acceptability have shifted very rapidly for transgender-related discussions. (p116 of the Open bundle)
>
> The language used to discuss transgender matters is 'sensitive, contested and constantly evolving (p128 of the Open Bundle)
>
> (*Examining trends in editorial standards in coverage of transgender issues,* IPSO, November 2020)

82. The discussions with stakeholders took place at an early, information gathering stage in the process of developing policy and developing the schools pack. It is important that the CPS and stakeholders are able to engage in open and candid discussions at this early stage in the process of deliberations.

83. Where topics are controversial and polarised and where, in particular, norms and the use of language is sensitive, contested and constantly evolving, it is not simply a lack of courage or independence on the part of the individual civil servant or on the part of the stakeholders which might inhibit free and frank exchanges of views.

84. It is important to have a safe space to explore ideas and gather information on stakeholder views in these very controversial areas without having to focus on what terms, approaches or definitions might be deemed acceptable in the future at the point at which those emails became publicly available; on what the consequences might be on the public perception of

the CPS which has responsibilities in relation to hate crime and sexual offences, or on the public perception of a stakeholder organisation which has a particular cohort of which it needs to maintain the confidence.

85. Having considered the withheld material, we find that its disclosure would be likely to cause a chilling effect irrespective of the specific content of any particular email because of the broad nature of the information: the exploration of ideas and the gathering of information on stakeholder views in a very controversial area. Further we have taken account of some specific content which we find illustrates the sensitive nature of these emails in general, as highlighted in closed by Ms Thelen.

86. Mr. Ritchie gave a small number of other examples in closed where a topic was regarded particularly sensitive and controversial, but where it is vital for the CPS to understand particular stakeholders' views at this information gathering stage. It was not suggested that all engagement with stakeholders on any issue would engage the exemption.

87. Slightly different considerations apply to the information requested in part (c) of the request, because it does not form part of the 'information gathering' from stakeholders requested in part (a), and therefore slightly different safe space considerations apply.

88. The issues in relation to sensitivity, changing norms, the importance of terminology and the rapidly shifting goalposts of acceptability also apply to internal discussions amongst senior CPS management relating to the legal threat and subsequent publicity. Further we have accept the specific evidence given by Mr. Ritchie in para 19 of his closed witness statement and we have taken account of the content of the withheld information. The internal discussions relate to matters that were still 'live' in the sense set out above.

89. In summary, we accept that Mr. Ritchie has clearly explained on the particular facts of this case the basis for the 'chilling effect' and the continuing need for a safe space in October 2020 in relation to both types of information requested.

90. In the circumstances we find that the opinion of the QP that disclosure of the requested information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation was reasonable. We find that the section is engaged.

91. In considering the public interest balance, we have given due weight to the opinion of the DPP. Further, having heard the evidence of Mr. Ritchie we find that there is a clear risk that the free and frank exchange of views would be inhibited by the disclosure of the information requested in either part (a) or part (c) of the request in an area where it is particularly important that the CPS can freely exchange views either internally or with external stakeholders.

92. Taking into account all the matters set out above, we find that the issue was, at least to some extent still live, in October 2020 and that this inhibition was likely to impact on the important and ongoing work that the CPS has in the area of hate crime.

93. We think there is a strong public interest in avoiding this.

94. In terms of the public interest in disclosure of this information, we accept that there is an increased public interest in transparency in general surrounding the deliberations which led

up to the publication of the school pack, the decision to withdraw and the fallout from that decision. We have reached this conclusion in the light of:

94.1. the importance and controversy of this topic;
94.2. the circumstances in which the schools pack was withdrawn;
94.3. the fact that the CPS has acknowledged that when refreshing the schools pack the stakeholders it engaged with had views that aligned closely with Stonewall and Gendered Intelligence in relation to self-identity.

95. Apart from the heightened general public interest in transparency, we do not accept that the disclosure of this particular information serves the particular public interests highlighted by the Appellant. It was in the public domain at the relevant time that the CPS had engaged with Stonewall and Gendered Intelligence because it is in the schools pack. If the Appellant is interested in a list of the organisations that the CPS engaged with in the production of the refreshed schools pack, she has asked the wrong question. The request is limited to communications with the two particular organisations and will not illuminate the consultation process as a whole. At the time, it was routine to engage with those organisations and any controversy which has arisen since in relation to Stonewall is not relevant to the public interest at the relevant time.

96. For these reasons, although we accept that there is an increased public interest in transparency for the reasons set out above, we do not accept that there is a weighty public interest in the disclosure of this particular information.

97. Taking all these factors into account, we find that the public interest in maintaining the exemption outweighs the public interest in disclosure.

98. For the above reasons the appeal is dismissed. We do not need to consider the application of s 40(2).

Signed Sophie Buckley Date: 31 May 2022

Judge of the First Tier Tribunal