Case Reference: EA-2023-0041
NCN: [2023] UKFTT 600 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP

Heard on: 16 June 2023

Decision given on: 11 July 2023

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PAUL TAYLOR
TRIBUNAL MEMBER RAZ EDWARDS

Between

TRACE DEBT RECOVERY UK LIMITED

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: Timothy Pitt-Payne KC (Counsel)
For the Respondent: Christian Davies (Counsel)

Decision: The appeal is allowed. The Department for Levelling Up, Housing and Communities ('the Department') was not entitled to rely on section 35 of the Freedom of Information Act 2000 (FOIA) to withhold the requested information.

There was no appeal against the Commissioner's conclusions in relation to sections 10, 17 and 42 and these are upheld.

Substituted Decision Notice – IC-200026-C3C1

Organisation: Department for Levelling Up, Housing and Communities

Complainant: Trace Debt UK Limited

For the reasons set out below:

(i) The public authority was entitled to rely on section 42 of the Freedom of Information Act 2000 to withhold part of the requested information as specified by the Commissioner in the original decision notice.

(ii) The public authority breached section 10 and section 17 as it failed to respond to the request within 20 working days as set out by the Commissioner in the original decision notice.

(iii) The public authority was not entitled to rely on section 35 to withhold the remainder of the requested information (the emails contained in the closed bundle).

(iv) The public authority is required to disclose the remainder of the requested information (the emails contained in the closed bundle) to the requestor within 35 days of the date this decision is promulgated.

(v) Any failure to abide by the terms of the tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-200026-C3C1 dated 19 December 2022. That notice held that sections 35 and 42 were engaged and that the balance of public interest favoured maintaining those exemptions. The Commissioner also found that the Department had breached section 10 and section 17 as it failed to respond to the request within 20 working days.

2. Trace Debt Recovery UK Limited ('Trace Debt') only appeals the decision in relation to section 35 FOIA.

Factual background

3. The tribunal gratefully accepts and adopts the following factual background from the parties, which is amalgamated from the Commissioner's response, his skeleton argument and Trace Debt's reply.

4. There are two different legal frameworks applicable to the enforcement of parking charges. These are: (a) the local authority framework, regulated by the Traffic Management Act 2004; and (b) the framework which applies to parking on private land in England and Wales, primarily governed by the law of contract.

5. Private parking companies will typically: (a) charge a tariff for parking at the sites that they manage; and (b) issue a Parking Charge Notice ("PCN") for non-compliant parking, that is to say, parking that breaches the terms and conditions applicable to the parking location in question (e.g. because the tariff has not been paid, or the

maximum stay period has been exceeded). About 99.7% of parking events on private lands are compliant with the terms and conditions in force at that location and do not result in the issue of a PCN.

6. One of the key functions of parking tariffs is to enable parking operators to provide parking management services to landowners, it being impossible to provide such services without an appropriate level of payment (see **ParkingEye Ltd v Beavis** [2016] AC 1172).

7. Where the terms and conditions of parking are breached, the private parking company may do one or more of the following: (a) issue a PCN; (b) obtain the details of the registered keeper of the vehicle in question from the Driver and Vehicle Licensing Agency ("DVLA") and seek to recover the amount of the PCN against the registered keeper; (c) make use of the services of a specialist debt recovery agency ("DRA") in order to recover any unpaid amount; and (d) charge a further fee in addition to the PCN (a "debt recovery fee"), to reflect the cost of debt collection.

8. Both PCNs and debt recovery fees provide a deterrent against non-payment of parking tariffs. The involvement of a DRA provides an opportunity for the motorist or registered keeper to engage in relation to their unpaid parking debt before the matter goes to Court.

9. In 2018, the Parking (Code of Practice) Bill was introduced as a private member's bill by Sir Greg Knight MP, a Conservative backbencher. It became the Parking (Code of Practice) Act 2019 ("the 2019 Act") in March 2019.

10. The 2019 Act sets out a framework for the statutory regulation of the private parking industry.

11. Once in force, section 1 of the 2019 Act will require the Secretary of State to produce a Code of Practice containing (among other things) guidance that promotes good practice in the operation and management of private parking facilities; and guidance about appeals against parking charges imposed by, or on behalf of, persons providing private parking facilities.

12. Section 2 prescribes the procedure by which the Code of Practice is to be approved by Parliament and requires the Secretary of State to consult various specified categories of persons before preparing the Code.

13. Section 3 will impose a duty on the Secretary of State to keep the Code under review.

14. Section 5 provides that failure on the part of any person to act in accordance with the Code does not impose any legal liability on that person, but will require the Secretary of State to have regard to such failure when considering whether inter alia to exercise his discretion to disclose vehicle registration and licensing particulars to that person.

15. The practical effect of section 5(2)(a) is that the Secretary of State can restrict access to DVLA details for operators whose car parking management is not in accordance with the Code, thereby making it difficult for such operators to enforce any parking charges.

16. The majority of the 2019 Act has not yet been brought into force, including those provisions referred to above. Section 12(2) of the 2019 Act gives the Secretary of State the power to bring the remaining provisions into force by regulations.

17. In August 2020 the Secretary of State issued a consultation document. The purpose of this consultation, together with a parallel consultation run by the British Standards Institute, was to produce a Code of Practice for the purpose of the 2019 Act. Neither of these parallel consultations raised any issues as to debt recovery fees.

18. In a consultation outcome document dated 20 March 2021, the Department stated that the Code of Practice "is only one part of a wider regulatory framework". This response did not address debt recovery fees.

19. Following threatened judicial review proceedings, the Government announced (on 3 May 2021) that a further consultation would be conducted.

20. On 30 July 2021 a further consultation document was published (the "Further Technical Consultation" Exhibit LE3 at p F221), which included a proposal to cap the level of debt recovery fees at £70 (see paragraph 36 of the document). The Further Technical Consultation did not contain any proposal to ban debt recovery fees outright, and did not seek any expression of views in relation to any such ban.

21. On 7 February 2022, the Department published:

    21.1. The proposed Code of Practice;
    21.2. A response to the Further Technical Consultation;
    21.3. An explanatory document for the proposed Code of Practice.

22. The Parking Code was laid before Parliament on 7 February 2022.

23. The response to the Further Technical Consultation, and the Parking Code, indicated that a decision had been taken to ban debt recovery fees. The section of the Parking Code under the heading "Escalation of costs", provided that:

> "The parking operator must not levy additional costs over and above the level of a parking charge or parking tariff as originally issued."

24. The reason given for this in the response to the Further Technical Consultation was that the consultation had not "generated evidence" to support imposing such fees: see paragraphs 29-30.

25. The Ministerial Foreword to the Parking Code stated that:

> "Private firms issue roughly 22,000 parking tickets every day, often adopting a labyrinthine system of misleading and confusing signage, opaque appeals services,

aggressive debt collection and unreasonable fees designed to extort money from motorists.[1]

Apart from their inherent unfairness, these practices damage our high-streets, our towns and our city centres.

This is why we threw our full support behind the Parking (Code of Practice) Act 2019 introduced by Sir Greg Knight.

This set out a clear vision for the regulatory system with the interests of safe motorists at its heart and a commitment to making sure that individuals who deliberately park dangerously or obstructively can't get away with it.

The publication of this Private Parking Code of Practice is a big step towards translating that bold vision into reality."

26. The Parking Code was not intended to come into full effect immediately. It stated that:

"This Code of Practice has been created to specify requirements for the operation and management of parking by private companies in England, Wales and Scotland and as such will be adopted by the Secretary of State for Levelling Up, Housing and Communities (the Secretary of State) for the purposes of meeting his obligations under Section 1 of the Parking (Code of Practice) Act 2019." (Emphasis added by the Commissioner.)

"There will be an implementation period to allow parking operators to align with the requirements of the Code before it comes into effect. Operators will be expected to fully adhere to the new Code by the end of 2023, by which time we expect the new single appeals service to be operational."

27. The "single appeals service" referred to is understood to be a proposed new appeals process in respect of private parking charges that the Department intends to introduce to operate alongside the Parking Code. The details of this service are yet to be confirmed.

28. Trace Debt is a DRA. It is part of the Trace Enforcement Group that provides debt recovery and enforcement to a variety of businesses and sectors including the private parking management and local authority sectors. Trace Debt's services include PCN processing, Tracing Services, Printing and Mailing and Contact Centre Call handling.

29. On 6 May 2022 various Claimants involved in the private parking industry (not including Trace Debt) commenced proceedings by way of judicial review to challenge two decisions set out in the documents published on 7 February 2022:

29.1. The decision to ban debt recovery fees in the private parking sector; and
29.2. A decision in relation to the permissible level of parking charges for private parking operators.

[1] Trace Debt denies that the views set out in that passage are a fair or accurate representation of the business conducted by Trace Debt, or by the private parking industry generally.

30. The Parking Code was withdrawn on 7 June 2022. The Department website states that it has been "temporarily withdrawn pending review of the levels of private parking charges and additional fees".

31. For the purposes of this appeal, the relevant information withheld in reliance on section 35 is a chain of emails between the Department and interested stakeholders.

Request

32. This appeal concerns a request made by Trace Debt on 24 March 2022:

> "Please can you supply me with copies of the following in relation to the Private Parking Code of Practice:
>
> [1] Copies of any correspondence between the Ministry of Housing Communities and Local Government, and the Ministry of Justice, in relation to the charging of debt fees to motorists on unpaid Parking Charge Notices.
>
> [2] Copies of any legal advice obtained by the Ministry of Housing Communities and Local Government in relation to the charging of debt fees to motorists on unpaid Parking Charge Notices.
>
> [3] Copies of any other advice (either internally from government departments, or externally from other sources) obtained by the Ministry of Housing Communities and Local Government in relation to the charging of debt fees to motorists on unpaid Parking Charge Notices.
>
> For the avoidance of doubt "debt fees" here include any escalation of costs (as defined in Section 9 of the Private Parking Code of Practice - published 7 February 2022) or any additional charges, levied by Parking Companies or Debt Collection Agencies where pursuing unpaid Parking Charge Notices from motorists."

33. The Department responded to the request on 10 June 2022. It provided some information but refused to disclose the remainder relying on sections 35 (formulation of government policy etc.) and 42 (legal professional privilege) of FOIA. The Department upheld the decision on internal review on 15 August 2022.

Decision notice

34. In a decision notice dated 19 December 2022 the Commissioner held that section 42 and section 35 were engaged and that the public interest in upholding the exemptions outweighed the public interest in disclosure.

35. In relation to section 42 the Commissioner found that the barrister's opinion was covered by legal professional privilege and the exemption was engaged. He found that whilst parking charges is an issue which affects large numbers of people, it did not outweigh the considerable public interest in allowing public authorities to seek and receive high quality legal advice. He also noted that the legality of any policy is ultimately judged by the courts and not by barristers.

36. In relation to section 35 the Commissioner concluded that the withheld information related to the development of the Parking Code and so the exemption was engaged.

37. On the public interest, the Commissioner recognised that at the time of the request, a version of the Parking Code had been published (though it was subsequently withdrawn in June 2022).

38. The Commissioner noted that at some point between the publication of this version of the Parking Code and the beginning of June 2022, a legal challenge was launched against the Parking Code. The Commissioner concluded that it seemed likely that pre-litigation correspondence would have commenced (or at least been anticipated) when the Department should have responded to the request at the end of April.

39. Given that the Department would have been at least aware of pending litigation at that point, the Commissioner considered that, although a version of the Parking Code had already been published, the issue was still one that was "live" rather than settled at the point at which the Department was required to comply with the request.

40. The Commissioner recognises that civil servants should be afforded a certain degree of protection when discussing and debating new policy ideas. The protection required is strongest when the policy-making process is ongoing and will decline once a policy has been formally announced.

41. The Commissioner accepted that the withheld information would have been of some use in understanding how the Code had been prepared but, given the relatively narrow focus of the request, any public interest would be limited.

42. The Commissioner considered that disclosing the information would make civil servants and stakeholders more reticent in discussing novel policy ideas – particularly in relation to controversial issues.

43. The Commissioner considered that the public interest arguments in this case were finely-balanced. Given the fact that the Commissioner considered that the policy was still in development, he considered that the balance of the public interest favoured maintaining the exemption.

Grounds of appeal

44. The Grounds of Appeal are:

Ground 1

The Commissioner erred in law in concluding that the formulation of government policy was ongoing following the first publication of the Parking Code of Practice;

Ground 2

The Commissioner erred in completing its assessment of the public interest.

Ground 1

45. It is submitted that the Commissioner presumed the position of pre-litigation correspondence without any evidence to do so, where the original request was made before the litigation was commenced.

46. Trace Debt submit that the Commissioner has failed to address the fact that the Parking Code was published at the time, concluding the process of formulating government policy. The Commissioner took the view that because there was a legal challenge to the result of that policy-making process, the matter remained live so that a new Code could be produced. Trace Debt argue that it cannot be correct that the determination of whether a government department's process for making policy and/or decisions has reached an end is dependent on the actions of external parties, who challenge that policy and/or those decisions.

Ground 2

47. It is submitted on the part of Trace Debt that due to the Commissioner's incorrect interpretation of what constitutes an ongoing policy-making process, he has incorrectly assessed and applied the public interest test in a way that withholds information that they accept would assist Trace Debt in understanding the issues in a concluded process of government policymaking.

48. Further, it is argued that the Commissioner failed to give sufficient weight to the strong public interest in disclosure. The consultation process on the proposed code has been protracted, and fraught with difficulties: the first consultation was not followed by publication of any code, the second consultation led to the publication of the Parking Code, but this was then withdrawn, and it seems that there will now be a third consultation. In these circumstances, there is a compelling public interest in understanding what has gone wrong in the process of producing a statutory code.

The Commissioner's response

Ground 1

49. The Commissioner submits that section 35 is not limited to cases in which the policy-making process is still 'live' at the time of the request. The 'liveness' question may go to the assessment of the public interest balancing test.

50. The Commissioner maintains that, as a matter of fact, the policy-making process did remain in progress, or 'live', at the time of the request for the following reasons.

    50.1. The obligation on the Secretary of State to produce the Code of Practice under the 2019 Act had not been brought into force at the time of the request (and still has not). Accordingly, the version of the Code published before the statutory regime has come into force was necessarily preliminary.

    50.2. The published Code of Practice stated that it would not become fully effective until the end of 2023, almost two years after the date on which the original version was published.

50.3. The Code of Practice is only one part of the Department's wider reforms of the private parking industry. For example, the Secretary of State intends to introduce an appeals process in relation to private parking enforcement, which was referred to extensively in the published Code, but has not yet done so. This will form part of the same broader policy programme as the Code itself.

50.4. The Department has confirmed its policies in this area remain under review, including in light of the opposition to the original Code of Practice and the litigation that was threatened following its publication.

50.5. Not long after the date on which the Department should have responded to Trace Debt's information request, the Code of Practice was withdrawn and has remained withdrawn ever since. The Commissioner understands that the policy set out in the Code is being reformulated and redeveloped before the Code is reissued.

51. These factors indicate that the Parking Code was not a fully settled policy decision at the time of the request. At that time, it was predictable that the Parking Code itself and the wider policy agenda in relation to private parking enforcement was subject to further formulation and developments.

Ground 2

52. For the reasons given in relation to Ground 1, the Commissioner maintains that he did not err in reaching the conclusion that "the policy was still in development".

53. The Commissioner further relies on the observations of Upper Tribunal Judge Turnbull in **Amin v Information Commissioner v DECC** [2015] UKUT 0527 (AAC) that there is a broad spectrum of possibilities as regards the degree of finality of a policy, and there is no particular degree of 'liveness' which must still exist in order for disclosure of information about the policy-making process to potentially prejudice the public interest. Even if no policy formulation is occurring at the time of the request, if it is likely that the policy might need to be reconsidered and that previous disclosure of information relating to policy-development might prejudice that reconsideration, that can be taken into account as part of the public interest assessment.

54. The Commissioner maintains his conclusion that "civil servants must be afforded a degree of protection when discussing and debating new policy ideas".

55. In the circumstances of the case, in which the policy position in relation to private parking remained in flux, the Commissioner considers that the public interest favoured maintaining the exemption to preserve this safe space for policy development.

56. In addition, the Commissioner maintains his conclusion that "the withheld information would have been of some use in understanding how the Code had been prepared but, given the relatively narrow focus of the request, any public interest would be limited".

57. The Commissioner submits that it is not immediately apparent why the disclosure of advice that the Department received in relation to charging of debt fees on private parking tickets would further the public understanding of the process by which the Code was produced.

58. It is submitted that by the time of the request the Department had already published consultation documents, summaries of responses and consultation outcomes in relation to this area of ongoing policy development. These documents provide information about the process by which the policy in this area has been developed, which weighs against the public interest in disclosing any particular chain of correspondence with stakeholders in relation to the same.

Reply by Trace Debt

Ground 1

59. It is submitted on behalf of Trace Debt that the policy-making process as to debt recovery charges had reached a conclusion on 7 February 2022. This was the issue to which the FOIA request was directed. The documents published on that date set out a decision that debt recovery charges should be banned. The fact that the Code of Practice was not intended to become fully effective until the end of 2023 and that the Code is only one part of the proposed wider reforms of the parking industry do not alter that position. The timescale given was not to enable further review or amendment to contents of the Code: rather, it was to give an opportunity for the changes set out within the Code to be put into effect, and to allow time for the proposed establishment of a single appeals service.

60. As to the judicial review proceedings relating to the decisions announced on 7 February 2022, Trace Debt argue this was not a matter under the control of the Government, was not part of its policy-making process, and ought not to be relied upon in relation to the question of whether the policy making process had come to an end, or when determining the balance of public interest.

Ground 2

61. The public interest in disclosure relied on by Trace Debt has both a procedural and a substantive dimension.

62. In relation to procedure, Trace Debt submit that the decision-making process adopted in relation to the proposed Code of Practice was obviously and fundamentally flawed. The documents issued on 7 February 2022 adopted a policy that had not been raised as a possibility in the course of any of the prior consultations referred to above. There is a compelling public interest in understanding how it came about that a policy proposal of this nature and importance was adopted without any prior consultation, notwithstanding the duty to consult under section 2 of the 2019 Act.

63. In relation to substance, it is submitted that the proposal to ban debt recovery fees would be likely to lead to a number of adverse effects, including the following:

63.1. Private parking companies would reduce their use of DRAs, thereby reducing the opportunity for motorists to engage in relation to unpaid parking debts before the matter went to Court.

63.2. Private parking operators would be likely to make greater use of the county courts to enforce unpaid parking debts, leading to an increased burden on the Courts.

63.3. The increasing use of the Courts would in turn lead to an increase in the number of county court judgments against motorists in respect of unpaid parking debt, leading to an adverse effect on their credit scores.

63.4. Parking debts would become more difficult to enforce, leading to a reduction in the available amount of private parking and/or an increase in the parking tariffs charged.

63.5. DRAs have expertise in identifying cases where parking debts ought not to be pursued (either because there is a good excuse or mitigation for any non-payment, or because the individual in question is vulnerable in some way). Absent their involvement, there is an increased risk that parking debts would be pursued in cases of this nature.

63.6. If there had been a consultation about the proposal to ban debt recovery fees, those involved in the private parking and debt recovery industries would have sought to advance arguments along the above lines in the course of that consultation.

64. Trace Debt submit that there is a compelling public interest in understanding: (a) whether any of these adverse effects were taken into account during the policy-making process; and (b) given the potential adverse effects, why is it that the Government nevertheless decided to ban debt recovery fees.

65. Trace Debt argue that disclosure would materially contribute to the public understanding of the policy-making process leading to the publication of the proposed Code of Practice, in relation to both the procedural and substantive issues set out above. For the reasons set out above, that policy making process was significantly defective; disclosure will assist in avoiding any repetition of these issues. All of this amounts to a powerful public interest in disclosure, which was significantly understated by the Commissioner.

Evidence

66. We read an open and a closed bundle. Exhibit LE5 was incorrect in the original version of the bundle, and we replaced it at the start of the hearing with the correct document, a document headed 'Private parking charges, discount rates, debt collection fees and appeals charter: further technical consultation response'.

67. It is necessary to withhold the information in the closed bundle because it refers to the content of the withheld information, or consists of the withheld information, and to do otherwise would defeat the purpose of the proceedings.

68. We read and took account of a witness statement from Louis Ellis, Director of Trace Debt. Mr Ellis did not give oral evidence at the hearing.

The law

69. The relevant parts of sections 1 and 2 FOIA provide:

> "General right of access to information held by public authorities.
> 1(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.
>
> Effect of the exemptions in Part II.
> .....
> 2(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

70. **APPGER v Information Commissioner and Foreign and Commonwealth Office** [2016] AACR 5 gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out:

> "… when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

Section 35(a) FOIA

71. Section 35(a) FOIA provides as follows:

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

72. Section 35 is a class-based exemption: prejudice does not need to be established for it to be engaged. It is not an absolute exemption. The tribunal must consider if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

73. Case law has established in the FOIA context that "relates to" carries a broad meaning (see **APPGER** at paragraphs 13-25). In **UCAS v Information Commissioner and Lord Lucas** [2015] AACR 25 at paragraph 46 the Upper Tribunal approved the approach of the FTT in the APPGER case where it said that

"relates to" means that there must be "some connection" with the information or that the information "touches or stands in relation to" the object of the statutory provision.

74. The question of whether the policy-making process is still 'live' is an issue that goes to the assessment of the public interest balancing test, and not to whether the section 35(1)(a) exemption is engaged in the first place (**Morland v Cabinet Office** [2018] UKUT 67 (AAC).

75. The intersection between the timing of the FOIA request and its relevance to the public interest balancing test is helpfully analysed by the First-tier Tribunal in **Department for Education and Skills v Information Commissioner and the Evening Standard** (EA/2006/0006) ("DFES") at paragraph 75(iv)-(v) (a decision approved in **Office of Government Commerce v Information Commissioner** [2008] EWHC 774 (Admin); [2010] QB 98 ("OGC") at paragraphs 79 and 100-101):

> "(iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.
>
> (v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, section 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances. As is plain however, we do not regard a "seamless web" approach to policy as a helpful guide to the question whether discussions on formulation are over."

76. The public interest can wax and wane and the need for a safe space changes over time in relation to development of policy.

77. If disclosure is likely to intrude upon the safe space then there will, in general terms, be significant public interest in maintaining the exemption, but this has to be assessed on a case by case basis.

78. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect, in this case the

efficient, effective and high-quality formulation and development of government policy.

79. In relation to 'chilling effect' arguments, 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):

> "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."

80. The Commissioner invites the Tribunal to dismiss the appeal, in summary, because:

80.1. The public interest favours maintaining the "safe space" afforded to government departments to formulate and develop policy, including by consulting candidly with external stakeholders, away from the public eye.

80.2. The public interest in maintaining the safe space is particularly important in relation to complex and contentious policy decisions, and in cases where the policy development is ongoing at the time the public authority is required to respond to the FOIA request. All of these factors are applicable in the present case.

81. The "liveness" or otherwise of a policy falls to be considered, to the extent relevant, in the context of the public interest test.

82. The Commissioner submits that it is a trite observation to say that there is a powerful public interest in allowing a "safe space" within government departments for the development of policy, away from the public eye. The need for a safe space is particularly important in the case of complex and/or contentious policy issues.

83. Contrary to Trace Debt's case, the Commissioner argues that the public interest in preserving that 'safe space' did not dissipate overnight when the version of the Code of Practice was published by the Department on 7 February 2022. The labelling of a particular policy-making process as no longer 'live' is far from being a complete answer to the strong public interest in maintaining the privacy of government officials' candid correspondence produced during the course of that policymaking process. There is a broad spectrum of possible cases in between, and both the length of time elapsed since the decision, and the likelihood of the same policy having to be revisited in the future are of clear relevance to where the balance of the public interest lies.

84. It is submitted that, notwithstanding the publication of a version of the Code on 7 February 2022, the Department's policy in this area was clearly sufficiently 'live' to mean that the public interest in maintaining the exemption remained strong. Moreover, during the relevant period, various members of the private parking industry (not including the Appellant) commenced judicial review proceedings in relation to the Code of Practice.

85. It is argued that the Department was at the time of the request, and still is now, reformulating and redeveloping the Code and its policies in this area more generally. The policy in this controversial area remains in flux. That is precisely the type of situation in which the 'safe space' must be preserved in the public interest.

86. The Commissioner submitted that neither the procedural issues nor Trace Debt's substantive complaints are sufficient to override the public interest in preserving the safe space for policy development.

87. To the extent that Trace Debt believe either the procedure adopted, or the substance of the Department's decisions, were unlawful, the Commissioner submits that the appropriate way to ventilate such arguments is in an application for judicial review.

If, on the other hand, Trace Debt simply disagrees with the Department's decisions, that cannot override the public interest in preserving the exemption, irrespective of whether or not there is any merit in the Appellant's underlying concerns about the specific policy matters.

88. It is submitted that it is inevitable that there will be people who object to all major policy developments. No matter how strongly that objection is felt, it cannot trump the public interest in affording government the safe space to develop and formulate those policies, including by consulting candidly with external stakeholders away from the public eye.

Oral submissions

89. We heard oral submissions from both parties, which we have considered and taken into account.

The role of the tribunal

90. The tribunal's remit is governed by section 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 he 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.

Discussion and conclusions

91. The issues we have to determine are:
    - 91.1. When is the appropriate time for assessing the public interest balance?
    - 91.2. Does the withheld information relate to the formulation or development of government policy?
    - 91.3. Does the public interest in maintaining the exemption outweigh the public interest in disclosure?

The time for assessment of the public interest balance

92. Both parties agreed that the date for assessing the public interest balance was the date by which the public authority should have responded under FOIA (referred to in this decision as the 'deemed date'), rather than the date on which the public authority in fact responded ('the actual date'), even if this was outside the statutory time limit.

93. Although this was not canvassed in the hearing, the tribunal takes the view that a 'deemed date' could only apply in cases where the response is late. It has to be remembered that the Commissioner and the tribunal are standing in the shoes of the public authority. The public authority is the one who first has to assess the public interest balance.

94. If the public authority replies, for example, within 2 days of the request, then that is the only sensible date at which to assess the public interest. Otherwise a public authority would have to assess the public interest balance at a future date in the light

of events which had not yet happened. Accordingly in our view, in the usual case when the response is in time, the public interest is to be assessed at the actual date.

95. It might be thought that the precise date within the 20 day deadline would make no difference to the public interest balance. However, it is the experience of this tribunal that the public interest balance can be materially influenced by events taking place in a single day such as the release of a detailed summary of the withheld information or a parliamentary statement announcing the relevant policy. These factual matters will affect the amount of information already in the public domain and/or the state of 'liveness' of a process of policy formulation. In turn this will influence the decision as to where the public interest balance lies for the public authority, the Commissioner and ultimately the tribunal.

96. In our view, where the response is within the statutory time limit the date for assessing the public interest balance must be the actual date of the response. The question for us to consider is whether the position is any different where the response is given outside, sometimes many months outside, the statutory time limit. Is there, in effect, a long-stop of the date for compliance when it comes to assessing the public interest balance?

97. At the start of the hearing the Judge raised with the parties the issue of whether their agreed position was contrary to **Montague v Information Commissioner** [2022] UKUT 104 (AAC). The Judge drew the parties' attention to the recent decision of the First-tier Tribunal (FTT) in **DLUHC v ICO** EA/2022/0143 and EA/2022/0144, [2023] UKFTT 00427 (GRC).

98. In that decision the FTT, which had included the same Judge and one of the same members as this tribunal, had accepted a submission from the Department that the public interest balance should be assessed on the actual date even where that was outside the statutory time limit.

99. The tribunal is not bound by earlier decisions of the FTT. However, it is obviously desirable, particularly on an issue such as this, if FTT decisions are consistent.

100. Although there was no appeal of the decision in EA/2022/0143 and 0144 it is clear from the Commissioner's submissions today that the Commissioner does not agree with that decision. From this we infer that the Commissioner continues, despite that decision, to assess the public interest balance in decision notices on the deemed date rather than on the actual date. We presume that this is only in the case of late responses for the reasons set out above.

101. The parties were given time to consider this point, given that it had not previously been raised. Both parties continued to maintain that the relevant date was the deemed date.

102. The tribunal is conscious that:

    102.1. In this appeal, both parties take the same position on the law;
    102.2. The Department was aware that the Commissioner had, in the decision notice in this appeal, assessed the public interest at the deemed date (see

paragraph 10) and has chosen not to apply to be joined to the proceedings or to make submissions on this issue;

102.3. The Department has access to legal advice and representation and has the resources to take part in proceedings if it considers it appropriate.

103. In those circumstances it is not for the tribunal effectively to argue the point on behalf of the Department on the assumption that they might have adopted the same position in this appeal as they did in EA/2022/0143 and 0144.

104. Mr. Pitt-Payne noted that in **Montague** the request was made in November 2017 and the public authority responded in February 2018. This is outside the statutory time limit. At paragraph 87 the Upper Tribunal concluded that 8 February 2018 was the appropriate date:

> "We therefore conclude that the FTT erred in law in its decision, and in para 110 of that decision in particular, in not confining itself to assessing the balance of the competing public interests for and against disclosure on the basis of matters as they were at the date of DITs (initial) refusal decision of 8 February 2018."

105. Despite this, Mr. Pitt-Payne submitted that, first, there is no indication in **Montague** that it would have made any difference if the earlier date had been adopted and second, it is clear that nobody raised the issue in **Montague**. On that basis he submitted that Montague does not 'grapple with' this issue, which we take to mean that, in his submission, **Montague** is not a binding authority either way.

106. The tribunal accepts that **Montague** does not deal with the question of whether or not the 'date of the refusal decision' is the date of the actual decision, or the date by which the public authority should have responded. There was no argument on this issue before the Upper Tribunal and it was not material to the appeal. The Upper Tribunal does not discuss or reach a conclusion on this issue. We are persuaded on this basis, contrary to what the FTT decided in EA/2022/0041 and 0042, that **Montague** is not binding authority on this particular point.

107. In the absence of binding Upper Tribunal authority on this point, the question of the appropriate date is for this tribunal to answer. The answer is to be provided by construing the relevant statutory provisions in context (see **Montague** para 48).

108. Mr. Pitt-Payne submitted that there were a number of serious difficulties in using the actual date of the response as the appropriate date. First, he submitted that in principle it would be surprising if the fact that a public authority was late in answering a request and did not heed a statutory time limit affected the way that the public interest balance was approached. He argued that this would be particularly odd if the effect was to assist the public authority in making out that an exemption applied.

109. We accept this argument. Using the actual date places the time for assessing the public interest balance in the hands of the public authority. The public authority who does not comply with the statutory time limit is in a more favourable position that those that comply. A public authority can delay its decision until the public interest in disclosure is lower or the public interest in maintaining the exemption is higher. It

can wait until a policy is finalised, or until other information has been published. None of this is desirable.

110. Previously when the appropriate date had been taken to include an internal review, it was generally assumed to include only a timeous or in-time review (see paragraph 57 of **Montague**). This was presumably to avoid a difficulty similar to that identified by Mr. Pitt-Payne.

111. The second 'serious difficulty' that Mr. Pitt-Payne identified relates to the problem of cases in which a public authority fails to respond. In those circumstances, he asks, what would be the 'actual date' at which the public interest balance is to be assessed? The Judge raised with Mr. Pitt-Payne the question of the route between a failure to respond and a tribunal (or the Commissioner) having to assess the public interest balance. Mr. Pitt-Payne submitted that this might arise if a complaint was made to the Commissioner about a failure to respond, and the public authority raised an exemption at that stage.

112. Although this submission is superficially attractive, the tribunal's view is that where there is a complaint to the Commissioner in circumstances where a public authority has not yet provided a response, it would not be open to the Commissioner, or the tribunal, to consider any substantive exemptions raised by the public authority. That is what is sometimes referred to as a 'gateway' appeal i.e. where the public authority has not yet given a substantive response to the request for information and therefore has not yet passed through the "gateway" of compliance with sections 1, 2 and 17 of FOIA which, following the Upper Tribunal's Decision in **Malnick v IC and ACOBA** [2018] UKUT 72 (AAC), the public authority would have to do before being entitled to raise a late exemption before the tribunal. The appropriate outcome would be for the Commissioner or the tribunal to order the public authority to provide a response in accordance with Part 1.

113. For those reasons we do not accept that the second 'serious difficulty' is one which will arise in practice.

114. There are, in our view, a number of aspects of **Montague** which point towards the actual date being the appropriate date. First, **Montague** makes a number of references to an 'in-time' or 'timeous' review decision. That adjective could have been but is not used in relation to the initial refusal decision. Second, the Upper Tribunal in **Montague** concluded on the facts that the appropriate date in that case was 8 February 2018. That was the actual date of the response, outside of the statutory time limit. The Upper Tribunal did not apply, or apparently consider applying any longstop of the deemed date. We accept that it was not argued otherwise and it is unclear to what extent, if any, the Upper Tribunal took account of the fact that the response was late. However, if the Upper Tribunal had anticipated any kind of long stop being applied, one might have expected them to apply it in the case before them.

115. The Commissioner submits that it is clear from the analysis of the statutory provisions in paragraphs 65 -57 of **Montague** that the public interest must be assessed at the time that the public authority deals with the request in accordance with the requirements of Part 1 of FOIA, and Part 1 of FOIA requires the response to be made within 20 working days.

116. Paragraphs 63-67 of **Montague** read as follows:

> "63. When read in context the language of "original decision" in *Evans* therefore supports a conclusion that the competing public interests have to be judged at the date of the public authority's decision on the request under Part I of FOIA and prior to any internal review of that initial decision. And *Evans* certainly lends no support to the DIT's argument about the appropriate date here being the 'final' decision of the public authority whenever so made.
>
> 64. Nor, in our judgment, does either *APPGER* or *Maurizi* advance matters any further on this issue of when precisely the date of the public authority's refusal decision is to be identified. The positing in para 52 of APPGER of the Information Commissioner being "charged with assessing past compliance with FOIA" does not take matters any further forward as it leaves unanswered when precisely the public authority is to comply with a request for information under FOIA. Nor, for the same reasons, do we consider *Maurizi*'s reference (at para 163) to the Information Commissioner inquiring "into the way in which a public authority completed the activity of responding to a request for information made under FOIA" really advances matters. The issue remains when the law requires the request to be answered.
>
> 65. However, both decisions assist in pointing to the need to identify, if possible, in the primary legal source, FOIA, the obligation on the public authorities as to when it is to decide a request. As we have referred to above, the critical wording is that of whether the public authority has dealt with a request for information in accordance with the requirements of Part I of FOIA. The requirements of Part I of FOIA in terms of deciding a request for information are all concerned with the (initial) decision on the request for information. Nothing in Part I of FOIA imposes any obligation on a public authority to review a refusal decision and re-decide it. Section 1(1) falls within Part I and, as we have seen, sets out the core FOIA duty if a public authority holds the information requested to communicate that information to the requester subject to, inter alia, an exemption not applying to that information. Section 1 of FOIA does not, however, provide any time frame for the public authority deciding the request, although it does in section 1(3) put a hold on the need to comply with subsection (1) if the public authority reasonably requires further information in order to identify and locate the information requested.
>
> 66 Section 10, which is also in Part I of FOIA, does provide the time frame. It is titled "Time for compliance with requests" and provides so far as is relevant as follows.
>
> > "(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
> >
> > "(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and

ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

"(3) If, and to the extent that- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied, the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

"(4) The Minister for the Cabinet Office may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations."

67. Section 10 needs to be read with section 17, which is also in Part I of FOIA and which concerns the notification by a public authority of a refusal of a request. (Presumably no notice is required under the Act where a request is met in full as compliance with the request is sufficient in itself to satisfy section 1.) We have set out the key parts of section 17 earlier in this decision. The important point for present purposes is that both sections 10 and 17 are concerned with the time limit(s) for complying with the request and what must be set out when refusing a request. The need to make a decision on the request, whether to meet or refuse it, is not explicitly provided for in FOIA, save for in section 17(2), but is necessarily implicit in the function of the public authority in responding to the request. Crucially, however, the decision is made on the request and once made, as far as Part I of FOIA is concerned, brings to an end that which the public authority is required by law to do by Part I of FOIA. There is nothing in Part I of FOIA, or elsewhere in the Act, that imposes any obligation on a public authority to review a decision it has made to refuse a request."

117. We accept the Commissioner's submission that the Upper Tribunal places significant emphasis on the statutory requirements of Part 1, including the time limit for responding to a request. In relation to the 'issue of when precisely the date of the public authority's refusal decision is to be identified', the Upper Tribunal observes in paragraph 64 that 'The issue remains when the law requires the request to be answered'.

118. Paragraph 65 states, in relation to **APPGER** and **Maurizi** that 'both decisions assist in pointing to the need to identify, if possible, in the primary legal source, FOIA, the obligation on the public authorities as to when it is to decide a request.' The Upper Tribunal then identifies this obligation in section 10 (at paragraph 66).

119. We accept that it is possible that this focus on the statutory language and the statutory time limit in Part 1 of FOIA in these paragraphs in **Montague** arises simply from the fact that the Upper Tribunal was considering whether to include the internal review which is not required under Part 1, and that it does not bear the weight that the Commissioner is placing upon it. The Upper Tribunal decided that the 'initial

decision' meant the decision which the public authority had an obligation to make under Part 1. It therefore excluded any decision which the public authority was not obliged to make under Part 1 i.e. the internal review decision. It does not necessarily follow that it also excludes a decision made in breach of the obligations in Part 1 in that it was made outside the statutory time limit.

120. However, on balance, we are persuaded that these paragraphs in **Montague** at the very least strongly suggest that, construing the relevant statutory provisions in context, the appropriate date should be the date when the law requires the request to be answered under Part 1.

121. Taking into account all the above, and focussing in particular on the statutory provisions, our view is that the time for assessing the public interest balance is determined by the statutory obligations in Part 1 of FOIA rather than at large and subject to determination by the whim of a dilatory public authority.

122. For those reasons we find that the time for assessing the public interest balance is the date of a public authority's initial response, subject to a long-stop of the deadline for compliance under section 10.

123. In this case the relevant date is therefore 25 April 2022.

Does the withheld information relate to the formulation or development of government policy?

124. This was not really disputed by Trace Debt. In any event, having reviewed the withheld information we take the view that it clearly relates to the formulation of government policy on the charging of debt recovery fees to motorists on unpaid Parking Charge Notices.

Does the public interest in maintaining the exemption in section 35 outweigh the public interest in disclosure?

Public interest in maintaining the exemption

125. The purpose of section 35 is to protect the effective, efficient and high-quality formulation and development of government policy and to protect good government. It reflects and protects some longstanding constitutional conventions of government. It reserves a safe space to consider policy options in private – civil servants and subject experts need to be able to engage in free and frank discussion of all the policy options internally, to be able to expose their merits and demerits and possible implications. It is in the public interest that officials and ministers have "time and space…to hammer out policy exploring safe and radical options alike, without the threat of lurid headlines depicting what has merely been broached as agreed policy" (**DfES** para 75(iv), approved in **OGC**).

126. Under section 35 there is no space where confidentiality can be assured because it is not an absolute exemption.

127. We accept that the 'liveness' of a policy is not black and white. Further we accept that the public interest in maintaining a safe space waxes and wanes and does not evaporate the moment a policy is announced. The need for a safe space is much greater when development of that policy is nearer the live end of the spectrum at the relevant date.

128. When considering the weight of the safe space in this appeal we have taken account of the following.

129. The response of the Department to the request on 10 June 2022 states:

> "The Department must also consider that disclosure of the information would potentially damage the policy making process in which officials are able to assess information, debate live policy issues away from external interference and advise ministers in a way which will inform their eventual policy decisions. The information you have requested includes internal advice and discussions and disclosure would be disruptive to policy development. Officials must feel able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and free from distraction that such information will be made public." (C45 of the open bundle)

130. The internal review outcome letter, dated 15 August 2022, states (our emphasis):

> "However, there is also a strong public interest in ensuring that there is an appropriate degree of safe space in which officials can gather and assess information and provide advice to Ministers which will inform their eventual policy decisions. In turn Ministers must feel able to consider the information and advice before them and be able to reach objective, fully informed decisions without impediment and free from distraction that such information will be made public. Such safe space, it is widely accepted, is needed where it is appropriate to safeguard the effectiveness of the policy process.
>
> ***These considerations carry most weight where the decision on policy has yet to be taken and the formulation or development process is still "live". The Private Parking Code of Practice has been temporarily withdrawn because it is pending review of the levels of private parking charges and additional fees, and therefore your request relates very much to a live policy on which decisions by ministers are still pending***. I therefore believe that the public interest is weighted in favour of withholding the information at this time."

131. In their letter to the Commissioner in the course of his investigation, the Department stated:

> "…we consider the fact that the Department had been undertaking a period of discussion and communication about Private Parking policy with stakeholders, and final detailed decisions by Ministers had yet to be taken on the decided policy in the light of such considerations, means the "formulation" stage had not yet been concluded at the time the department provided a response.
> …

… the fact is that detailed policy decisions around Private Parking had not been taken.
…
… The logic tends to be that once the formulation or development of a policy has been completed, the risk of prejudicing the policy process by disclosing information is likely to be reduced and so the public interest in maintaining the exemption deserves less weight. We are clear that set of circumstances did not apply in this case, and do not as yet.
…

…Such safe space, it is widely accepted, is needed where it is appropriate in order to safeguard the effectiveness of the policy process.

These considerations carry most weight where the decision on policy has yet to be taken and the formulation or development process is still "live". In this case the Department was developing both a Code of Practice and the wider regulatory framework that needed to be in place to enforce the Code. The Code was due to come into effect by the end of 2023.

The Department believes that the policy was still "live" at the time we responded to Mr Ellis's request (and it remains the case) and now remains a very sensitive time as we are in the process of developing the impact assessment and consultation on fee levels upon which ministers will take decisions. We think, therefore, the need for safe space around the advice and final decisions on policy detail are apparent.

Whilst protection of the policy process merits safe space, the need not to adversely affect the policy itself is another important consideration. It will be obvious that this is a high-profile area of government policy, attracting public and media attention, and that its effectiveness and success is of significant public interest. Nothing therefore should detract from Ministers' ability reasonably to take policy decisions that will help develop the policy around Private Parking. However, disclosure of the requested information would inevitably have attracted national media coverage and public speculation which would be harmful as it would have given the public a potentially inaccurate and misleading impression about the ultimate policy direction.

Whilst it can be argued that the fact information may be misinterpreted is not itself reason not to disclose it, there are powerful arguments to the contrary in this case. To try and avoid potential adverse repercussions, Ministers and officials would need to focus effort on explaining detailed discussion with stakeholders. Such unnecessary effort is avoidable and, even if deployed, might not be successful in correcting misunderstanding and its consequences. It is possible that such an unhelpful state of affairs may even lead officials and Ministers, under media and public pressure, to consider attaching less or more weight to certain factors, otherwise necessary to ensuring that objective, reliable analyses could be arrived at.

Clearly these are all factors that would serve to undermine the policy aims and delivery."

132. The Parking (Code of Practice) Act 2019 was enacted in March 2019. Much of it has not yet been brought into force. Section 1 (not yet in force) requires the Secretary of State to produce a Code of Practice and section 2 (not yet in force) prescribes the procedure by which the Code of Practice is to be approved by Parliament and requires the Secretary of State to consult various specified categories of persons before preparing the Code.

133. Although section 2 is not yet in force, it is apparent that the government has followed the process in section 2. Various consultations were undertaken and the Parking Code was laid before Parliament on 7 February 2022. The detail of the consultations is set out under 'Factual background' above.

134. We find on the basis of the Parking Code itself and the other documents which were published on the 7 February 2022, that the version of the Parking Code published in 7 February 2022 was intended to be the version of the Code which would come into force at the end of 2023. To that extent it was a final version of the Parking Code. We find that it was not anticipated in February 2022 that there would be any further consultations on or changes to the content of that Code before it came into force.

135. For example, the 'Further Technical Consultation' is said to be 'part of the process to *finalise* the Code' (our emphasis - see p 4 of LE5). The provisional timeline set out in the Further Technical Consultation in July 2021 provided that after that the consultation the Government would 'respond to the Further Technical Consultation and publish the *final* Code of Practice' (our emphasis). This would be followed by a transition period to allow parking operators to adapt to the new requirements, during which the model for the delivery of the single appeals service would be finalised. The transition period was expected to end in Summer 2022 at which point 'Parking operators must follow the requirements of the new Code of Practice'.

136. It is clear from the timeline that it was not anticipated that the Code of Practice itself would be under consideration during the transition period.

137. The timeline set out in the response to the Further Technical Consultation had been moved, but it still contains no anticipated reconsideration of the Code of Practice published in February 2022:

- January-March 2022: Product Discovery to research the needs of the users of the single appeals service.
- February 2022: Publication of Code of Practice and beginning of transition period.
- Spring 2022: Certification Scheme finalised and Scrutiny and Oversight Board appointed.
- Autumn 2022: Conformity Assessment Bodies (CABs) accredited by United Kingdom Accreditation Service.
- From Autumn 2022: All new park car parks will conform to the new Code.
- End of 2023: Single appeals service appointed and transition period ends. Parking operators must now follow the requirements of the new Code of Practice.

138. In relation to the specific policy to which the request relates, the response to the Further Technical Consultation sets out the Government position as follows:

> "29. The government recognises that DRAs can provide an additional level of deterrent. However, consultation responses did not provide us with sufficient evidence to determine whether additional fees are required as part of that deterrent, or if they use outweighs the costs to motorists from ill-informed or aggressive debt collecting practises.
>
> 30. Given the lack of evidence for the need for additional fees, the Code of Practise will not permit operators and DRAs to add additional fees on top of the amount of the parking charge in its current iteration. Operators will, however, be permitted to use DRAs, subject to additional safeguards such as a ban on misleading and intimidatory language in communications and greater protection for vulnerable customers.
>
> 31. We intend to review the policy as part of the general review of the Code of Practice, within two years of its implementation. In that review, we will consider such factors as the level of compliance with parking charges, the amount of court claims relating to unpaid parking charges and any changes in the practices and behaviour of DRAs as a result of the new Certification Scheme."

139. The Parking Code itself provided in the foreword:

> "…there will be no wriggle-room for rogue companies who continue to flout the rules. If they fail to follow this Code, they will effectively be banned from issuing parking charges indefinitely.
>
> I would like to thank everyone who has had a hand in developing this Code and its accompanying explanatory document – including those who took part in our public consultation.
>
> They have made sure that these changes will work on the ground, delivering real benefits for both businesses and motorists for decades to come.
>
> We recognise that many of these changes – like bringing private parking charges in line with local authority charges – will take time to implement.
>
> The publication of this Code therefore marks the start of an adjustment period in which parking companies will be expected to follow as many of these new rules as possible. The Code will then come into full force before 2024, when the single appeals service is expected to be in operation."
> …

140. The introduction to the Parking Code provided:

> "This Code of Practice has been created to specify requirements for the operation and management of parking by private companies in England, Wales and Scotland and as such will be adopted by the Secretary of State for Levelling Up,

Housing and Communities (the Secretary of State) for the purposes of meeting his obligations under Section 1 of the Parking (Code of Practice) Act 2019 (…).

This Code applies equally to the management of parking and stopping obligations on private land, whether or not the keeper liability provisions within the Protection of Freedoms Act 2012 are being relied upon, unless provisions relating to parking and stopping are regulated by byelaws.

…

There will be an implementation period to allow parking operators to align with the requirements of the Code before it comes into effect. Operators will be expected to fully adhere to the new Code by the end of 2023, by which time we expect the new single appeals service to be operational.

We will review the Code of Practice within two years of it coming into force by the end of 2023. We will take into account data from our ongoing monitoring of the Code and developments in the wider industry, for example any changes to local authority penalties."

141. Guidance, published at the same time as the Parking Code provides (our emphasis):

"This document accompanies the private parking Code of Practice, which was laid in Parliament on 7 February 2022. It is intended to provide background on how the government produced the Code, with input from a Steering Group of stakeholders and a public consultation from August to October 2020, and the key changes that the Code will bring in. Full details are contained in the Code itself, which is the **binding document**.

…

This section provides further detail on the views submitted by stakeholders and the public throughout the BSI process. For issues of particular importance, it explains how the government and BSI took account of those views in producing the **final** Code of Practice.

Introduction (including implementation period)

In many cases, the Code is an evolution of current industry standards, so we expect that many of its requirements will not represent significant change for parking operators. However, we recognise that operators will need time to align with some of requirements and will therefore put in place an implementation period before the Code comes into effect. Operators will be expected to fully adhere to the new Code by the end of 2023, by which time we expect the new single appeals service to be operational.

We will review the Code of Practice within two years of it coming into force by the end of 2023. We will take into account data from our ongoing monitoring of the Code and developments in the wider industry, for example any changes to local authority penalties."

142. We find on the basis of the timetables and extracts above that it was considered in February 2022 that consultation on the Parking Code had been completed and that the

Parking Code published in February 2022 was the code that would come into force at the end of 2023. The decision had been taken in relation to debt recovery fees and was set out in that published code. We find that it was not anticipated at that stage that any further work or consultation on the formulation and development of this aspect of policy would take place until the general review of the Code of Practice within two years of its implementation.

143. We accept that further development work and consultation was intended to take place in relation to, for example, the single appeals service. However the publication of the Parking Code marked the end of a chapter, to use Mr. Pitt-Payne's phrase, in relation to the formulation and development of policy on debt recovery fees. We do not accept that, at the relevant time, there was any ongoing 'period of discussion and communication about Private Parking policy with stakeholders' in relation to the relevant policy and we find that, at that stage, final detailed decisions had already been taken on debt recovery fees.

144. The fact that judicial review proceedings were subsequently commenced and that, as a result, the Parking Code was withdrawn supports our conclusions that, in February 2022, a 'decision', of such finality that it was amenable to Judicial Review, had been taken in relation to the Government position on debt recovery fees.

145. Did anything change between 7 February 2022 and the relevant date of 25 April 2022? The Commissioner argues that by then the Department is likely to have received pre-action correspondence in the judicial review proceedings, which were commenced on 6 May 2022 and which led to the withdrawal of the Parking Code on 7 June 2022 for further consultation.

146. The Commissioner asks us to infer that the Department would have received, as a minimum, a pre-action letter 14 days before issue i.e. by 22 April 2022.

147. We note that the Department were aware from the decision notice that the relevant date, according to the Commissioner, was 'at the end of April' (see paragraph 10 of the decision notice). They were also aware, from paragraph 16 of the Notice of Appeal, that Trace Debt specifically challenged the decision notice on the basis that the Commissioner had 'presumed the position of pre-litigation correspondence without any evidence to do so'. If the Department had wished to provide evidence of any pre-litigation correspondence they could have done so. The Department did not respond to the tribunal's invitation to join as a party to the appeal (see paragraph 10 of the CMD dated 20 March 2023 at p B42).

148. The Pre-action Protocol for Judicial Review sets out a code of good practice and contains the steps which parties should generally follow. We do not know if the parties in the Judicial Review did follow the pre-action protocol. If they did send a letter before action, we do not know when that was sent. In the absence of any evidence as to whether any pre-litigation correspondence was received and, if so, when, there is insufficient evidence before us on which we could base a conclusion that the policy formulation or development process had either recommenced or was anticipated as being likely to recommence when looking at the position on 25 April 2022.

149. Looked at overall our view is that the development and formulation of the policy on debt recovery fees had reached a fairly final stage at the end of April 2022. The final version of the Parking Code had been published. It had not been withdrawn, nor was there any indication at that stage that it would be withdrawn. It was not anticipated that it would be substantively reviewed until after it had been implemented, after which it was anticipated that there would a be a review within two years. In our view this significantly reduces the need for a safe space in relation to the process and policy development that had led to the production of the Parking Code, including that part which deals with debt recovery fees.

150. The fact that the Parking Code had very recently been published, that it was not expected to come into force until the end of 2023, and the fact that a review had been planned are factors that suggest that it was more likely that the policy would be reconsidered, and the formulation and development process reopened, than if for example a code was already in force and had no planned review date. This risk that the policy might be reconsidered and the formulation and development process reopened, adds to the public interest in maintaining the exemption. Further, there were related aspects of the policy that were still to be consulted on and finalised, including the appeals process. This also adds to the public interest in maintaining the exemption. The fact that this is a complex and contentious area adds further weight.

151. In the circumstances, we find that in late April 2022, despite the fact that decisions had already been taken in relation to parking debt charges and the content of the code in general, there remained a reasonably weighty public interest in maintaining the safe space.

152. The Department asserts that disclosure of the requested information would inevitably have attracted national media coverage and public speculation which would be harmful as it would have given the public a potentially inaccurate and misleading impression about the ultimate policy direction. Having reviewed the withheld information, it is not apparent to us how the disclosure of these particular emails could have this effect. We note that this is not something relied upon by the Commissioner. We do not accept that this is a potential consequence of disclosure and so it does not add weight to the public interest in maintaining the exemption.

The public interest in disclosure

153. In summary, we have concluded there is a strong public interest in disclosure of the requested information.

154. We accept that the decision to ban debt recovery fees outright in the Parking Code is a decision with significant consequences that had not been canvassed at all in any of the prior consultations. This is a very significant factor that weighs very heavily in favour of transparency in relation to the way in which that decision was reached.

155. In his evidence Mr. Ellis raises a number of serious consequences which Trace Debt say will flow from the decision to ban debt recovery fees. They include the viability of companies such as Trace Debt and significant impacts on the opportunity for motorists, including vulnerable motorists, to engage in relation to unpaid fees before the matter ends up in Court. Although it is not for the tribunal to judge whether these

are valid points, they are certainly points which Trace Debt and others have not had the opportunity to raise in the public consultation process, because the consultations were conducted on the basis that it was the amount rather than the principle of debt recovery fees that was up for consideration.

156. Where a policy decision with potentially serious consequences for otherwise viable businesses and for at least a reasonable section of members of the public has been taken apparently without proper consultation, there is in our view a very strong public interest in transparency in relation to the process by which that decision was reached, and the views that were or were not sought or considered. The withheld information serves that interest both through what it does and what it does not contain.

157. For those reasons we have concluded that there is a strong public interest in disclosure.

Conclusion on the public interest balance

158. Our conclusions are that although on 25 April 2022 there remained a reasonably weighty public interest in maintaining the exemption this is outweighed by the strong public interest in disclosure.

The tribunal's discretion as to what steps to order

159. As set out above, the parties have proceeded throughout on the basis that the relevant date was 25 April 2022. The Department was aware of this and has chosen not to take any part in proceedings. Both the Department and the Commissioner are, no doubt, aware that the tribunal has a discretion in deciding what steps to order.

160. Neither the Commissioner nor the Department has put forward any argument or evidence in relation to the current state of formulation or development of policy in this area and any potential impact on the tribunal's discretion. The authorities indicate that an order requiring disclosure should 'usually follow, save for exceptional cases' (see para 31 of **ICO v HMRC and Gaskell** [2011] UKUT 296 (AAC). In the circumstances we have determined that it is appropriate to exercise our discretion in the usual way and order the public authority to disclose the requested information.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 10 July 2023