IN THE UPPER TRIBUNAL **Appeal No. GIA/271/2018**
ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge K Markus QC

The appeal is dismissed.

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Confidential Annex to these Reasons is not to be published nor disclosed to any person other than the Cabinet Office and the Information Commissioner.

Representation:
The Appellant: Mr R. Hopkins (counsel)
The First Respondent: Did not appear
The Second Respondent: In person

REASONS FOR DECISION

Introduction and Background

1. The Public Duties Cost Allowance ('PDCA') is paid to former Prime Ministers to assist with the costs of continuing to fulfil duties associated with their previous position and subject to a maximum limit of £115,000. It was introduced in 1991 and the amounts claimed by former Prime Ministers are published annually by the Cabinet Office. Cabinet Office guidance for payment of the allowance is also available to the public. In 2015 the Prime Minister agreed exceptionally to extend the allowance to Nick Clegg, the former Deputy Prime Minister in the Coalition Government.

2. On 12 July 2016 Mr Webber made the following request to the Cabinet Office:

> "I see from your latest accounts that the PDCA is now available to Nick Clegg. Please provide me with an electronic copy of all recorded information you hold regarding Nick Clegg's eligibility for this allowance, except (i) details of his claims, and (ii) the total amount he has claimed.
>
> This will no doubt include information on how he came to be eligible, who proposed this, his response, and so on".

3. Relying on section 35(1)(a) of the Freedom of Information Act 2000, the Cabinet Office refused to disclose the information. The Information Commissioner upheld the decision. The First-tier Tribunal ('FTT') allowed the appeal in part. The Cabinet Office appeals against that decision insofar as it relates to one particular document, a memorandum from the Cabinet Secretary to the Prime Minister ('the memorandum').

Section 35(1)(a) Freedom of Information Act

4. Section 35(1)(a) of the Freedom of Information Act 2000 ('FOIA') provides:

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

5. This is a qualified exemption which means that, where it applies, the information is exempt if "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information": section 2(2)(b).

The First-tier Tribunal's decision

6. Mr Webber accepted that the disputed information related to the formulation or development of government policy and so section 35(1)(a) was engaged. The issue before the FTT was as to the balance of the public interest under section 2(2)(b) of FOIA. Ms Sharon Carter, the Cabinet Office Head of the Propriety and Ethics Team, filed a witness statement and gave evidence at the FTT hearing. In her statement she said this as regards the claimed exemption:

> "13 …It concerns the development of policy in the area of PDCA and eligibility for PDCA, which was in progress at the time the information was created, and was ongoing at the time of the request. It is clear from the nature and content of the withheld information that this policy issue was in a state of development. I can also confirm that policy on PDCA remains actively under review at the time of this witness statement.
>
> 14. The role of Deputy Prime Minister from 2010 to 2015 was unique. Since the inception of PDCA in 1991, there have been no other coalition governments and no other Deputy Prime Ministers who are also the leaders of the junior party in a coalition government. The nearest corollary in British political history would be Clement Atlee in the wartime Coalition Government, who was Deputy Prime Minister and also leader of the junior party in the coalition. In his role as Deputy Prime Minister, Mr Clegg supported the Prime Minister in the oversight of the full range of government policy and initiatives.
>
> 15. The consideration and extension of PDCA to Mr Clegg recognised this unique position and the ongoing costs associated with his former responsibilities. As would be expected, there was some discussion about how and in what terms this extension should be granted, and the information and scope of the request sets out very clearly the policy development process in this area.
>
> 16. The release of this information relating to policy development in this area would have a detrimental effect on the ability of the Prime Minister and senior officials to have a free and frank discussion and exchange of views about the eligibility of individuals for, and the extent of PDCA. There must be a space within which officials are able to discuss their views on the emerging policy options freely and frankly so as to provide the Prime Minister with the most effective and comprehensive advice. Government Ministers, including the Prime Minister, are rightly answerable for the decisions they take, not for the options they consider or the other influences on the policy formulation process. The disclosure of information about these considerations and discussions would invite judgments about the content of those considerations, the options considered, the opinions held by different officials, and would introduce a premature scrutiny of the policy options considered in this process. Ultimately, this would be corrosive of parliamentary

democracy since it would hold ministers and their advisors accountable for the discussion rather than the decision.

17. I recognise that there is a general public interest in openness of government and acknowledge that transparency may contribute to greater public understanding of and participation in public affairs. I also understand that there is a public interest in understanding how the government develops policies, including those in relation to areas such as the payment of PDCA. I also recognise the specific public interest in understanding how decisions on allowances payable to public figures are made. When considering the balance of the public interest in this case, I take into account the timing of the request, which was just over a year after the creation of the information and scope of the request, and while policy development in this area was still ongoing.

18. Good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure. There is of course a place for public participation in the policy making process, and for public debate of policy options. However, it is not in the best interests of policy formulation, and therefore not in the public interest, that every stage of the policy making process should be made accountable via exposure to public scrutiny.

19. The candour which is evident in the e-mail chains demonstrates the frank and open discussion of the various policy options in this case. Releasing this information would damage the safe space necessary for the most effective development of policy. Officials and minister should be able to consider and advise on all options without considering whether those discussions, rather than the final decision, are held accountable.

20. The Government recognised the interest in this extension of PDCA, and was aware of the need to account for this novel payment. That is why the payment of the allowance was published, with a note, in the Cabinet Office annual report and accounts."

7. Ms Carter's oral evidence, as summarised by the FTT in its reasons, included her view that it would be difficult to disentangle the information relating to the decision to award the PDCA to Mr Clegg from wider policy discussions and, in any event, the basis upon which Mr Clegg received the award would be relevant to future decisions.

8. The FTT decided to uphold the exemption in relation to some emails between officials, as they related to development of policy in relation to the PDCA. However, it decided that the information which related specifically to the payment to Mr Clegg could be treated differently and that the public interest in favour of withholding that material was outweighed by the public interest in disclosure. Its reasons were as follows:

29. The Tribunal agrees with the Cabinet Office and the Information Commissioner that, depending on the circumstances, disclosing information about government policies that are still being formulated is likely to result in damage to the public administration of affairs. We accept what Ms Carter had to say on this issue, as well as Mr Hopkins' submissions thereon. The fact that civil servants are required by their Code to provide full and frank advice to Ministers is, with respect to the appellant, not an answer to this point. Public officials may well change their behaviour, in unconscious ways, or else adopt forms of discourse, which are "safer" but less efficient, particularly in times of rapid interplay of ideas.

30. This is the case with the e-mail chains, referred to in paragraph 19 of Ms Carter's witness statement (see above). Notwithstanding what we say below, the release of these e-mails, comprising initial exchanges between officials at the beginning of the policy process, would, we find, inflict harm on the very interests which is it is the purpose of section 35(1)(a) to protect. Conversely, given what is in the public domain and what we are about to say, releasing the emails would add little or nothing of actual significance to public debate on the extension of the PDCA to Mr Clegg.

31. Mr Hopkins submitted that it was, in practice, not possible to sever the relevant information relating to Mr Clegg from the totality of the disclosed information. With some exceptions, however, as identified in the Closed Annex, we consider that the other material within the scope of the request can be severed from the wider issue of the PDCA itself and whether, and if so, how, it should continue to operate.

32. We turn to the issue of whether this severable material ought to be withheld because it concerns government policy, which is still being worked upon.

33. An analogy may be helpful at this point. It is obvious that the Government will always keep under review the issue of taxation. The fact that Value Added Tax, for example, may change from time to time, both as to its rates and exemptions, cannot, in the Tribunal's view, be used to invoke section 35(1)(a), so as to withhold information about a particular policy decision in the VAT field, such as a change in rate, which has already crystallised.

34. By the same token, the fact that policy on the PDCA as a whole was being considered at or around the time of the refusal to disclose the requested information to the appellant, is not a valid reason for refusing to comply with the appellant's request, concerning Mr Clegg.

35. The appellant wanted to know how it was that Mr Clegg was brought within the terms of the PDCA. Plainly, by the time of the refusal the policy decision to include him had been taken.

36. Ms Carter contended that, in the future, issues would be likely to arise as to whether other deputy Prime Ministers or other figures should receive the PDCA. As a result, she suggested that the policy that had led to the decision to pay Mr Clegg the allowance was to be regarded as still in a state of development.

37. We respectfully disagree. The decision to include Mr Clegg is as historical as the decision to pay the allowance to previous Prime Ministers. The fact that it may serve as a precedent, in the light of which other, future decisions may be made, is nothing to the point.

38. Accordingly, we find that the public interest in favour of withholding the material, which is severable and is not the email material mentioned in paragraph 32 above, is much weaker than the Cabinet Office contend. It relates to a separate policy decision, to pay Mr Clegg the PDCA for a limited period of time, which had been taken before the appellant made his request.

39. We next consider the issue of the public interest in favour of disclosure. We have taken account of the Cabinet Office's submission that a significant amount of information relating to the decision to pay Mr Clegg the allowance is in the public domain. We also note the limited nature of the press coverage, following the appellant's discovery of the announcement relating to Mr Clegg in the Cabinet Office's accounts.

40. We agree with the appellant that there is, nevertheless, a significant public interest in shedding light on the formulation of the policy that resulted in the decision to pay Mr Clegg the allowance. As the appellant says, the PDCA emerged in 1991

> as a result of a prime ministerial decision, lacking any parliamentary involvement. There is clearly a strong public interest in knowing why decisions are taken to pay significant sums of public money to fund the activities of former Prime Ministers. The decision to extend the PDCA to include a Deputy Prime Minister is subject to at least the same degree of legitimate interest, if not more.
>
> 41. We agree with the appellant that this public interest is not materially diminished, if the withheld material were to reveal nothing problematic in terms of official and ministerial decision making. On the contrary, one of the purposes of FOIA is to encourage good decision-making in official circles and thereby to increase public confidence in decisions taken on its behalf.

9. The FTT decided that information which was specified in a Closed Annex (which included the memorandum) should be disclosed. It continued:

> "43. The information to be disclosed concerns the crystallised policy to pay Mr Clegg the allowance. It does not include information that, upon analysis, is about the policy concerning the entire PDCA system. That policy remains under review and has not crystallised. The public interest in withholding information concerning it is stronger than the public interest in its disclosure.
>
> 44. The information to be disclosed also does not include the e-mail exchanges, referred to at paragraph 30 above, comprising initial thoughts and comments of officials. Insofar as they may be said to be within scope, the public interest in their disclosure is significantly outweighed by the public interest in enabling officials to have private space to converse freely, in seeking to ascertain what they are being asked or required to do."

The parties' submissions

10. The Cabinet Office advanced three grounds of appeal.

11. The first ground was that the FTT erred in law in deciding that the information about the decision regarding Mr Clegg could be severed from the information about the PDCA policy overall. Given the very small number of individuals to which the PDCA applies, the analogy with VAT was inapt: "decisions about PDCA are nothing like decisions about taxation details".

12. The second ground was that the FTT's decision that the public interest in maintaining the exemption was "much weaker" than the Cabinet Office contended turned on its assessment that the "the decision to include Mr Clegg is *as historical* as the decision to pay the allowance to previous Prime Ministers" (emphasis added). The Cabinet Office submitted that the FTT erred in law because (i) it was irrational because the decision regarding Mr Clegg was not as historical as previous decisions about the PDCA; (ii) the need for safe space does not end or decisively diminish solely because a decision has been taken; and (iii) the FTT failed to consider whether the internal discussions about Mr Clegg's case were sufficiently recent and frank for concerns about safe space and chilling to apply.

13. The third ground was that the FTT failed to give consideration to the parties to the memorandum, to whom concerns about safe space and chilling effect applied with particular force.

14. Mr Webber resisted each ground of appeal. First, he submitted that the FTT's decision that the information relating to Mr Clegg could be severed from the rest was one of fact as to the likelihood and severity of a chilling effect should the

memorandum be disclosed. The VAT analogy, even if imperfect, did not undermine that decision. Second, he said that the FTT did not draw a bright line between past decisions and present/future decisions but found as a fact that the decision regarding Mr Clegg was no longer live as a result of which the need for a safe space in relation to that decision had diminished. Finally Mr Webber pointed out that ground 3 was a new point not advanced before the FTT and, in any event, there was no proper basis for concluding that the chilling effect was likely to be greater in relation to communications between those occupying senior positions.

Closed procedure

15. A short closed hearing took place before me, from which Mr Webber was excluded, at which I considered brief submissions from Mr Hopkins in relation to the Closed Annex to the FTT's decision and the small closed bundle of documents that had been before the FTT. It was necessary to consider the closed material because the nature of the policy issue which was in development was relevant to the decision regarding severability. Moreover, the FTT had given closed reasons which it has been necessary to consider. Plainly Mr Webber could not be permitted to see the closed material which was the subject matter of the appeal nor the FTT's closed reasons. I was satisfied that adopting this limited closed procedure was in accordance with the guidance in *Browning v Information Commissioner* [2014] 1 WLR 3848. Mr Webber did not object. Limited additional reasons for the decision on the appeal are provided in the Confidential Annex to this decision.

Discussion

Ground 1: severability

16. It was common ground before the FTT that all of the disputed information, including that relating to Mr Clegg, related to the formulation or development of government policy within section 35(1)(a) FOIA. The FTT found, as explained (albeit very briefly) at paragraph 29, that, "depending on the circumstances, disclosing information about government policies that are still being formulated is likely to result in damage to the public administration of affairs" and outweighed the limited if any public interest in their disclosure. The FTT found that to be the case with the email chains. I confess to having some doubts about this reasoning, particularly in the light of the guidance given by the Upper Tribunal in *APPGER v IC and FCO* [2013] UKUT 560 (AAC) at [149] and approved by the Court of Appeal in *Department of Health v IC and Lewis* [2017] EWCA Civ 374, [2017] AACR 30, at [43]. However, Mr Webber (an experienced litigant with a clear grasp of the relevant law and procedure) did not challenge the decision and I say no more about it.

17. This ground is concerned with the challenge by the Cabinet Office to the FTT's conclusion at paragraph 33 that the information relating to Mr Clegg could be severed from the rest because, Mr Hopkins submitted, the VAT analogy underlying that conclusion was fundamentally flawed.

18. I doubt that the VAT analogy was directed to the question of severability. Severability was addressed by the FTT at paragraph 31. The FTT then turned, at

paragraph 32, to the question whether the material "ought to be withheld", which must be a reference to the application of section 2(2)(b) of FOIA and the public interest balance, and the remainder of the decision including paragraph 33 was directed to that question. Moreover, the reference at paragraph 33 to a decision "which has already crystallised" suggests that the FTT was there concerned with the public interest in withholding information about a decision which had been taken, that being the matter that it went on to address in the subsequent paragraphs.

19. I acknowledge, however, that there is a fair degree of overlap between the decisions on severability and on the public interest and that paragraph 33 could be read as being, at least in part, directed to severability. In any event, even if the analogy was directed to the public interest balancing test, it is relevant to consider whether the analogy was flawed.

20. As to that, I agree with Mr Hopkins that the VAT analogy was flawed. This is not because, as he submitted, an individual decision is bound to influence the broader policy. That would depend on the nature of the individual decision and, importantly, what aspects of the policy were or might be in development. In my view the analogy was flawed because the example given, about the relationship between different decisions as to rates and exemptions, did not exemplify the relationship between individual decisions and broader policy development which was the intended purpose of the analogy.

21. However, despite that part of the reasoning being flawed, it does not render the FTT's decision irrational. The VAT analogy was given with the intention of illustrating the position. It did not form the core of the FTT's reasoning on severability or the public interest. The open reasoning on severability is found in the last part of paragraph 31: the wider issue of the PDCA was "whether, and if so, how, it should continue to operate". It is obvious that, although the FTT did not say so in so many words, it thought that this was a different issue to that of whether to pay an allowance to Mr Clegg. Similarly, the core reasoning regarding the public interest balance is in the following paragraphs and does not turn on the VAT analogy. I explain in the Confidential Annex that the FTT's closed reasons provide further support for its decision. Those reasons, too, stand independently of the VAT analogy.

<u>Ground 2: the treatment of the historic nature of the decision.</u>

22. It is clearly established that there can be a public interest in withholding information relating to the formulation or development of government policy after completion of the policy formulation or development process, the weight to be attached to that interest depending on the facts and circumstances: see *DEFRA v the Information Commissioner and the Badger Trust* [2014] UKUT 0526 (AAC) at [52] and [53], relying on the *obiter* conclusions of the High Court in *Office of Government Commerce v Information Commissioner (Attorney General intervening)* [2008] EWHC 774 (Admin), [2009] 3 WLR 627. The Information Tribunal's decision with which the High Court was concerned in the *OGC* case is annexed to that judgment. At paragraph 85 that Tribunal had referred to earlier decisions of the Information Tribunal, including *Department for Education and Skills v Information Commissioner* (unreported) 19 January 2007, to the effect that "government needs to operate in a safe space to protect information in the early stage of policy formulation and development". It went on "however at the time of

the requests the decision had already been taken, a Bill had been presented to Parliament and was being debated publicly. We therefore find that in the circumstances of this case that it was no longer so important to maintain the safe space at the time of the requests." In his judgment, at [100], Stanley Burnton J set out the relevant passage from the *Department for Education and Skills* case:

> "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."

23. Stanley Bunton J then went on to consider the challenge to the Information Tribunal's decision in the *OGC* case as follows:

> "101. Having referred to the fact that the Identity Cards Bill had been presented to Parliament, and was being debated publicly, the Tribunal found that it was no longer *so* important to maintain the safe space at the time of the Requests. I have italicised the adverb because it makes it clear that the Tribunal did not find that there was no public interest in maintaining the exemptions from disclosure once the Government had decided to introduce the Bill, but only that the importance of maintaining the exemption was diminished. I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in the finding that the importance of preserving the safe place had diminished. Accordingly, this ground of appeal is not made out."

24. In *Amin v IC and DECC* [2015] UKUT 0527 (AAC) Upper Tribunal Judge Turnbull considered and applied the above decisions in the context of regulation 12(4)(e) of the Environmental Information Regulations 2004, which exempts information which involves the disclosure of internal communications and the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Judge Turnbull recognised that there are differences between regulation 12(4)(e) and section 35(1)(a) FOIA, but he observed at [106] that, where government policy is concerned, the same sort of prejudice is likely to be relied on under both provisions. It was in that context that he referred to the cases mentioned above which were decided under both provisions. At [110] Judge Turnbull said that, even though at the time of the request no policy formulation was occurring, if it was likely that the policy may need to be reconsidered and that previous disclosure of the material might cause prejudice, that could be taken into account.

25. Judge Turnbull also said at [119] that, save where there is a question whether the withheld information relates to formulation or development of government policy (not in issue in the present case),

> "… it is not necessarily possible to say of a particular policy that is either 'live' or not 'live'. There is in reality a broad spectrum of possibilities as regards the degree of finality of a policy, and there is not a particular degree of 'liveness' which must still

> exist if prejudice to the public interest by reason of impingement on the safe space for policy formulation is to be capable of being found significant. As Mr Knight submitted: "There is no binary distinction between a policy being 'live' or 'not live.'"

26. In the light of the above, Mr Hopkins submitted that the FTT erred in this case because it adopted a bright line division between historic and live decisions. He submitted that the FTT should have adopted a graduated approach to the effect of the passage of time. Moreover, it should have recognised the possibility of the decision becoming relevant in the light of future policy decisions. Mr Hopkins said that the FTT's error was to approach the decision about Mr Clegg on the basis that, as soon as that decision had been taken, "the drawbridge had come down" and the public interest in withholding the material was treated as immediately losing much if not all weight.

27. In support of this ground Mr Hopkins relied on the FTT's statement that "The decision to include Mr Clegg is as historical as the decision to pay the allowance to previous Prime Ministers". He said that was patently incorrect factually, as the decision relating to Mr Clegg was more recent than the decisions regarding previous Prime Ministers, and it showed that the FTT had applied a binary distinction between past and live decisions rather than taking a graduated approach to the effect of the passage of time.

28. In my judgment the FTT's use of the phrase "as historical as…" is not to be understood in the way that Mr Hopkins contended. The FTT could not possibly have meant that that the decision about Mr Clegg was "as old as" those earlier decisions. That was evidently not the case and I reject the suggestion that the FTT would have taken such an absurd view of chronology. Paragraph 37 is the FTT's explanation for its rejection of Ms Carter's evidence that the policy that led to the decision to pay Mr Clegg was to be regarded as in a state of development. Understood in that context, the statement that the decision was "as historical as" other past decisions was a way of explaining that the decision was as much a matter of history as those other decisions. The word "historical" does not denote any particular age; it describes something which belongs to the past. The phrase "as historical as" is not a description of relative chronological age. In the particular context it was a reference to the stage of the decision-making process that had been reached: it was not in a state of development.

29. There is no doubt that the FTT gave very substantial weight to the past nature of the decision regarding Mr Clegg. Read together, paragraphs 33 to 35 indicate that the FTT approached the case on the basis that there was a clear distinction between live and past policy decisions, and paragraph 38 shows that the past nature of the decision was, in relation to the material being considered there (including the memorandum) a very significant factor in the FTT's approach to the competing public interests.

30. However, I do not agree with Mr Hopkins' analysis that the FTT treated the need for safe space as ending or decisively diminishing solely because the decision had been taken. The first two sentences of paragraph 30 show that the FTT recognised the weight of the public interest in withholding some of the information even though the decision about Mr Clegg had been taken. It follows that the FTT did not treat the past nature of the decision as precluding other public interest considerations in withholding the information. Rather, and put simply, the FTT's decision was that the public interest considerations which it identified at

paragraph 30 did not apply to all of the information relating to Mr Clegg and the memorandum.

31. As for Mr Hopkins' third submission under this ground, I agree that the FTT did not adopt a graduated approach to the effect of the passage of time once the decision had been taken. This is evident from its comment that the decision was "as historical as" older decisions. It did not consider that the public interest considerations might vary depending on how old the decision was. However, for reasons which I now explain, in the circumstances of this case that approach was not unlawful.

32. Judge Turnbull's observation that there is no binary distinction between a "live" or "not live" policy does not mean that a tribunal will be in error for relying on a policy's current or past status, nor for giving its past status considerable weight. This is clear from the authorities referred to by Judge Turnbull including the passage from Stanley Burnton J's decision which I have cited above. On the facts of *Amin*, it was difficult to characterise the policy there as being either "live" or "not live", but in other cases it may be clear that a decision is truly in the past. That was what the FTT decided in this case at paragraph 36, as I have explained above. Whether there is a continuing public interest in withholding information relating to past policy-making and the weight to be afforded to it, including the possibility of it becoming "live" again, "all depends on the facts and circumstances on the individual case" (*Badger Trust*).

33. It is for the public authority to provide evidence of the facts and circumstances to support a claim that disclosure of information relating to past policy-making will or might impact on current or future discussions. The FTT's decision in this case must be understood in the light of the evidence which was before it. Ms Carter's witness statement did not explain in what way the memorandum related to the wider policy development that was being undertaken nor in what way disclosure of the former would prejudice the latter. There was a limit to what she could have said in her open witness evidence, but there was no closed witness statement. The case in the FTT had not been prepared on the basis that the disputed information was severable and so Ms Carter's witness statement addressed the information as a whole. The only oral evidence on the point, in response to a question from the FTT and set out by the FTT at paragraph 26, was as follows:

> "…it would be difficult to disentangle the information relating to the decision to award the PDCA to Mr Clegg from wider policy discussions. In any event, the basis upon which Mr Clegg received the award would be relevant to future decisions."

34. The Closed Annex did not record any other evidence from Ms Carter on the point and Mr Hopkins has not suggested that there was anything else of relevance.

35. The FTT rejected the Cabinet Office's position that the decision-making regarding payment to Mr Clegg was part of the same process as the wider policy review and the two could not be separated. I have decided that the FTT's decision on severability was not unlawful. As for Ms Carter's second point, it may be the case that the award to Mr Clegg could be relevant to decisions regarding deputy prime ministers in the future, but the Cabinet Office's case before the FTT was that it was concerned about the effect of disclosure on the wider policy review which was being undertaken. Even if the decision about Mr Clegg would be taken into account when decisions regarding deputy prime ministers came to be taken, that

did not mean that it was of any relevance to the policy discussions which the Cabinet Office was concerned to protect in this case and there was nothing in the open or closed materials to show that it was. It seems to me that was what the FTT meant when it said that the possible precedential role of that decision was "nothing to the point". In any event, there was no evidence to show that disclosing the memorandum would give rise to prejudice to or in connection with future decisions about future deputy prime ministers. In the light of the above, it is readily understandable why the FTT identified no public interest consideration in favour of withholding the memorandum and treated the past nature of the decision, in the circumstances of this case, as being particularly significant.

36. In summary, the FTT had decided that the decision relating to Mr Clegg was a separate matter from the wider policy review. Once separated from that review, there was little to say about the public interest in withholding the information which related solely to that decision (other than the initial frank email exchanges, dealt with at paragraph 30). That information was not about the wider policy formulation which the Cabinet Office was concerned to protect.

37. In the light of this, there was no call for the FTT to consider whether the discussions about Mr Clegg's case were sufficiently recent and frank for concerns about safe space and chilling to apply. Given the irrelevance of those discussions to the ongoing policy review, the FTT was entitled to take the view that there was nothing in those discussions which called for protection once the decision had been taken. In the circumstances of this case, the FTT's approach was not unlawful.

Ground 3: the parties to the memorandum

38. The memorandum was between the Cabinet Secretary and the Prime Minister. Mr Hopkins submitted that concerns about safe space and chilling effect apply with particular force to communications between such parties, and that the FTT erred in failing to give consideration to the relevance of the parties to the memorandum in assessing the public interest balance.

39. The Cabinet Office made no such submission before the FTT. It was not an obvious point which the FTT should have addressed of its own motion and the FTT cannot be criticised for failing to address it. Indeed, the Cabinet Office failed in a similar submission in *Lamb v IC and Cabinet Office* EA/2015/0136 and, if it wished to persuade this FTT (incidentally, presided over by the same Judge) to take a different approach, it should have addressed the point.

40. In any event, in my judgment the submission is wrong as a matter of law. In *Lamb* the FTT rejected the submission for three reasons: (i) The logic of the submission would be to impose something close to an absolute exemption in the case of advice given to the Prime Minister; (ii) it is at the highest levels of the Civil Service that the public expects robustness in giving candid advice to the Prime Minister; (iii) it is at this level that officials can most be expected to be aware of the risk of disclosure of information. The reasoning was upheld by the Upper Tribunal in *The Cabinet Office v Lamb* [2016] UKUT 0476 (AAC) at [28]. I agree with the FTT's reasoning in *Lamb* and it applies with equal force in the present case.

41. Finally, Mr Hopkins submitted that the FTT should have addressed the seniority of the parties because they would be likely to attract considerable press interest and the FTT should have been realistic about the likely effect of press reaction. He

relied on *Department for Work and Pensions v The Information Commissioner, JS and TC* [2015] UKUT 0535 at [21]. I do not find that passage helpful in the present context. In the *DWP* case, there had been witness evidence about the disruption of normal business which media attention can generate, and the specific concern raised by the Upper Tribunal was as to the risk of irresponsible media coverage. In the instant case there was no evidence whatsoever before the FTT about likely press reaction nor any submission to that effect. If the memorandum was newsworthy because of the seniority of the parties to it, that would not of itself have meant that media reporting would have been irresponsible.

Signed on the original
on 4th December 2018

Kate Markus QC
Judge of the Upper Tribunal