Neutral Citation Number: [2017] EWCA Civ 374

Case No: C3/2015/1811

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
MR JUSTICE CHARLES

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2017

Before:

SIR TERENCE ETHERTON, MR
LADY JUSTICE BLACK
and
LORD JUSTICE DAVIS

- -

Between:

DEPARTMENT OF HEALTH	**Appellant**
- and -	
(1) THE INFORMATION COMMISSIONER	**Respondents**
(2) MR SIMON LEWIS	

- -
- -

James Eadie QC and Ravi Mehta (instructed by **Government Legal Department**) for the **Appellant**
Robin Hopkins (instructed by **The Information Commissioner**) for the **First Respondent**

Hearing date: 9 May 2017

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Approved Judgment

Sir Terence Etherton, MR:

1. This appeal arises out of a request to the Department of Health ("the Department") under the Freedom of Information Act 2000 ("FOIA") by the second respondent, Mr Simon Lewis, a journalist, for the disclosure of the contents of the Ministerial diary of the Rt. Hon Andrew Lansley MP for the period 12 May 2010 to 30 April 2011.

2. Following the Department's disclosure of a redacted version of the diary, the first respondent, the Information Commissioner ("the Commissioner"), by a decision dated 26 March 2013 required the Department to disclose the majority of the withheld information. The Department appealed to the First-tier Tribunal (General Regulatory Chamber – Information Rights) (Andrew Bartlett QC, Alison Lowton, John Randall) ("the FTT"), which by their decision dated 17 March 2014 substantially upheld the Commissioner's decision. The Upper Tribunal (Administrative Appeals Chamber) (Mr Justice Charles) ("the UT") in a decision dated 30 March 2015 dismissed the Department's appeal from the FTT. This is an appeal from the UT's decision.

3. Mr Lewis has not appeared, and not been represented, at any stage of the appeals process following the decision of the Commissioner.

4. As the FTT recorded in their decision, this is the first time that judicial consideration has been given to the disclosure of a Ministerial diary under FOIA.

The statutory framework

5. Section 1 of FOIA creates a general right of access to information held by public authorities, as follows:

> **"1. General right of access to information held by public authorities**.
>
> (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.
>
> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2 …"

6. Section 2 of FOIA sets out the effect on that general right of access to information of the absolute and other exemptions in Part II of FOIA. In particular, it sets out the public interest balancing test applicable in the case of those exemptions which are not absolute exemptions, and which are known as "qualified" exemptions. It provides as follows so far as relevant:

> **"2. Effect of the exemptions in Part II.**

> (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
>
> (a) the provision confers absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
>
> section 1(1)(a) does not apply.
>
> (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."

7. Section 3(2) of FOIA contains the following provision amplifying when a public authority "holds" information for the purposes of section 2. It provides as follows:

> (2) For the purposes of this Act, information is held by a public authority if—
>
> (a) it is held by the authority, otherwise than on behalf of another person, or
>
> (b) it is held by another person on behalf of the authority."

8. The relevant exemption on which the Department relies for the purposes of this appeal is that in section 35 of FOIA which, so far as relevant, is 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,
>
> (b) Ministerial communications,
>
> …
>
> (d) the operation of any Ministerial private office.

(2) …

(3) …

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section—

…

"Ministerial communications" means any communications—

(a) between Ministers of the Crown, … and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet …

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown …

…"

The decision of the FTT

9. The FTT heard argument and evidence on 18 and 19 November 2013. The evidence included witness statements and oral evidence from Sir Alex Allan, a distinguished former civil servant who was then the Prime Minister's Independent Adviser on Ministerial Interests, and Mr Paul Macnaught, the Director of Assurance within the Department and, as such, responsible for the Department's corporate governance, and who had been the Principal Private Secretary to the Secretary of State for Health during the whole of Mr Lansley's tenure.

10. The FTT delivered their written decision on 17 March 2014. Their decision is clear, conscientious and detailed. Only some of its content is relevant to the resolution of this appeal. I shall refer only to those parts.

11. The FTT dealt first with the less controversial exemptions before addressing the main disagreement between the parties on the impact of section 35.

12. In relation to non-Ministerial activities, the FTT recorded the Department's agreement that, when the entries were made, the date and time of the appointment were held by the Department within section 3(2) of FOIA because they were made for the purpose of avoiding conflicting Ministerial appointment. The FTT rejected the Department's contention that at the date of the request such entries were no longer "held" by the Department because it was merely providing electronic storage facilities for the information.

13. In relation to the exemption in section 35 of FOIA, the FTT held (at para. [28]) that the phrase "relates to" in section 35(1) "should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context"; and "[a] mere incidental connection between the information and a matter specified in a sub-paragraph of s.35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph".

14. Turning to the public interest balance for the purposes of section 35, the FTT made the following general observations at paragraph [48(b)] on the potential benefits and the potential harm of disclosure ("arising from the statutory wording and the experience of the FTT and the UT"):

> "In many cases it would not be realistic or appropriate for the Tribunal to demand that the requester or the Commissioner spell out or explain in great detail the particular benefits of disclosure. Underlying FOIA is an assumption that there is a general public interest in the transparency of public authorities: see, for example, *Evans v IC* [2012] UKUT 313 (AAC), [127]-[133]. The public interest in disclosure has by its nature a wide ambit, since it includes the high level reasons why Parliament passed the Act and why disclosure is generally in the public interest because it promotes transparency, accountability, public confidence, public understanding, the effective exercise of democratic rights, and other related public goods. In many cases it will be possible for the benefits of transparency to be identified only at a high and generic level. On the other side of the equation the potential harms of disclosure, and hence the particular benefits of maintaining an exemption, may be very specific. The fact that the benefits of disclosure are high level and generic does not of itself mean that they are to be regarded as insubstantial when compared with more specific benefits of non-disclosure."

15. In relation to the nature of the public interests served by section 35(1)(a), (b) and (d), the FTT said the following about the presumptive weight to be given to those interests:

> "74. The Commissioner submits, and the Department does not contest, that the broadly worded exemption in s35(1)(a) is not an exemption which has an inherent or presumptive weight independent of the particular circumstances: *Office of Government Commerce v IC* [2008] EWHC 774 (Admin), [79]. The Department submits, and the Commissioner does not contest, that in contrast, the greater specificity of the exemptions in s35(1)(b) and (d) can be taken as indicating some degree of inherent weight: *APPGER v IC and FCO* EA/2011/0049-0051, 3 May 2012, [146]. We bear these

> respective remarks in mind, but do not find them to be of much practical assistance in the present case, one way or the other. The general importance of a safe space for policy formulation and development is not in doubt. The interests which the s35(1)(b) and (d) exemptions are designed to protect are reasonably clear. Given the extent of the evidence adduced, theoretical points about whether the exemptions either have or lack inherent or presumptive weight do not seem to us to materially affect the decisions which we are required to make in the circumstances of the present case."

16. In paragraph [75] of their decision, the FTT (harking back to the general observations they had already made in paragraph [48(b]) referred "to the general philosophy of FOIA, that disclosure is generally in the public interest":

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

17. The FTT then went on to consider the public interests potentially served by disclosure in the present case under a number of different heads which could be identified from the evidence of Sir Alex Allan and Mr Macnaught. The FTT examined and largely rejected their evidence that the value of disclosure would be small or even negative in that it would give the public a misleading impression of how the Minister worked and spent his time.

18. The FTT summarised their assessment of the impact of disclosure on the interests served by disclosure in the following table in paragraph [90] of their decision:

Interests served by disclosure	*Impact if disclosed*
general value of openness and transparency in public administration	positive but adds nothing of significance to more specific considerations listed below
accountability: whether the public was getting good value from the Minister and whether he was properly carrying out his functions	positive

transparency relating to Ministerial meetings with external organisations and media organisations, lobbying, access to Ministers, and relations with particular interest groups	high
contributing to proper, informed public debate in relation to the Department's policies	minimal
contributing to public understanding of-	
how government works	significant
how the Minister spent his time	high
the procedural aspects of how he operated and how he made decisions	significant as regards how he operated, but not on how he made decisions
the focus and weight being placed on particular issues by the Minister and the Department over a particular period of time	positive
what private interests a Minister might have, which might impact on decision-making	negligible
the health service reforms and their development	positive but minor
the inter-departmental aspect of the NHS reforms as part of the democratic process	positive but minor

19. The FTT then turned to the arguments and evidence as to the impact of disclosure on the interests served by the three relevant exemptions in section 35. They identified a number of specific harms that were highlighted by the Department. The FTT was again critical of the evidence given by Sir Alex Allan and Mr Macnaught and said that their evidence:

> "compounds our difficulties over accepting their evaluative judgments as being objective and reliable. We do not accept it. We agree with the Commissioner's criticism that it depicts Ministers as unduly terrified of media stories."

20. Having examined closely each suggested head of harm and the arguments and evidence put forward by the Department in support of it, the FTT summarised in the following table in paragraph [109] of their decision their assessment of the impact of

disclosure in the present case on the interests served by maintenance of the relevant section 35 exemptions:

Claimed impacts on the interests served by maintaining one or more of the exemptions	*Rel.*	*Our assessment of the severity and likelihood of the claimed impact*
Potentially misleading information would need to be explained	(a), (d)	Modest additional burden is likely.
Speculation about relations between Ministers, and between Ministers and senior officials, particularly in the context of coalition government; burdensome and distracting to respond to	(a), (d)	Some modest additional work would be required.
Encouraging Ministers and officials to adjust their appointment schedules, building in unnecessary or pointless meetings so as to create the right impression	(a), (d)	Unlikely to occur.
Impeding policy formulation and development, particularly in the run-up to the Health and Social Care Act 2012.	(a)	Generally no impact on substantive safe space for policy-making. Procedural aspect: inquiries about purposes of meetings or contacts could generate some extra interaction with Press and public which would usually be limited but might in exceptional cases (not demonstrated here) significantly intrude on the safe space.
Impact on Ministers' ability to communicate freely with each other as and when necessary	(b)	No real bearing on collective responsibility. Special cases might give rise to a significant additional workload (but not demonstrated in this case).

Inhibition of proper record- keeping in the future, with consequent impact on operation of government	(a), (d)	Unlikely to have a material impact.
Curtailing Ministers' freedom to meet individuals and groups	(a)	Little effect on this.
Resource impact on private office, which would need to allocate higher grade civil servants to keeping Ministers' diaries	(d)	A significant factor, likely to occur, but capable of partial mitigation by a standardised system for making diary entries.

21. The FTT then concluded (at para. [110]), having regard to all the circumstances, that, albeit not by a particularly large margin, the balance came down in favour of disclosure because:

> "as we have indicated, there are in our view some likely real impacts on the interests served by the s35 exemptions, but they are relatively modest and we consider they are outweighed by the more significant benefits of disclosure which apply in this case."

22. The FTT said (at para. [111]) that the entries relating to non-Ministerial engagements were relatively few and did not materially affect the overall public interest balance or lead to the conclusion that those particular entries should be withheld in the public interest.

<u>The decision of the UT</u>

23. The written decision of Charles J in the UT is also detailed and carefully crafted. With no disrespect to the Judge, it is not necessary to refer to the decision in great detail since the primary focus on this appeal, as before the UT, is whether the FTT made an error of law, and Charles J considered that it had not.

24. Much of the focus of the UT's decision was on whether the approach in public immunity interest cases should apply in the present case. That is not a point sought to be advanced on the appeal to us.

25. On the public interest balance, the UT said (at para. [38]) that there is no presumption in favour of disclosure included in FOIA; rather, the position is that if, after a contents based assessment of the competing public interests for and against disclosure has been carried out, the decision maker concludes that the competing interests are evenly balanced, he or she will not have concluded the public interest in maintaining the exemption (against disclosure) outweighs the public interest in disclosing the information (as section 2(2)(b) requires).

26. The UT concluded (at para. [82]) that the FTT was clearly entitled to and indeed was right to proceed on the basis that parts of the views and reasoning advanced by the Department's witnesses were unconvincing and undermined the weight to be given to their objectivity, accuracy and reasoning as a whole; and that the FTT had properly and fairly identified the aspects of their evidence and argument that it accepted.

27. The UT then addressed, and rejected, the criticism of the Department that the FTT had carried out incorrectly the public interest balancing exercise because it had taken a generic or general approach to the public interest benefits of disclosure. It did so on the ground that, although certain parts of the decision of the FTT (especially paragraph [48(b)]) could be said to justify that complaint, when the FTT's decision is read as a whole it is apparent that the FTT recognised the need to identify with sufficient particularity the arguments on both sides of the benefits and detriments arguments, and the FTT's approach at paragraph [90] shows that the FTT linked the generic and general arguments in favour of disclosure to the contents of the diary and so of the information sought.

28. As to the issue whether the information was "held" by the Department, the UT said (at para. [114]) that there was a sufficiently direct connection between the non-Ministerial entries and the reasons why the Department was given them, recorded them and used them for its purposes, namely the operation of the Minister's private office in avoiding clashes (viz. enabling the Department to know where the Minister was, or was going to be, or had been, and so assisting in decisions being made on whether he should be or how he should be contacted when so engaged) to establish that the information was held by the Department when it was entered in the diary.

29. The UT further held (at para. [118]) that the non-Ministerial information remained held by the Department after the dates of the entries because, as a package and individually, all the contents of the diary remained linked to the Department. The UT further held (at para. [120]) that it was open to the FTT to conclude that, in all the circumstances, as the information was gathered for Departmental purposes it remained held by the Department at the date of the request.

Grounds of appeal.

30. There are no written grounds of appeal but the grounds can be identified in the skeleton argument for the Department on the application for permission to appeal. They can be summarised as follows.

31. (1) The UT was wrong to accept that the FTT adequately complied with the requirements of *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office* [2013] UKUT 0560 (AAC) ("the APPGER case") in relation to identifying the benefits of disclosure to the public; and erred in its implicit conclusion that there was any public interest whatever in the disclosure of the information in question. (2) The UT wrongly effectively introduced an approach or principle as to the assessment of damage from disclosure which required the Department to demonstrate actual harm from the disclosure of particular information rather than general argument that damage would flow from the disclosure of particular types of information. (3) The UT wrongly

decided that certain information concerning non-ministerial activities was held by the Department.

The appeal

32. Mr James Eadie, QC, who appeared for the Department on the hearing of the appeal did not advance any arguments on the second of those grounds of appeal.

Ground (1)

33. Mr Eadie's submissions on Ground (1) of the appeal were narrowly focused. On the general issue of the public interest in favour of disclosure, he urged caution over the statement of Lord Walker in *BBC v Sugar (No 2)* [2012] UKSC 4, [2012] 1 WLR 439, at [76] that "[t]here is a strong public interest in the press and the general public having the right, subject to appropriate safeguards, to require public authorities to provide information about their activities. It adds to parliamentary scrutiny a further and more direct route to a measure of public accountability". Mr Eadie emphasised that the broadly expressed entitlement to information under section 1 of FOIA is a conditional right, namely a right subject to the absolute and qualified exemptions in FOIA. He referred in that connection to the speech of Lord Hope in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, [2008] 1 WLR 155, at [4], quoted by Lord Walker in the BBC case at [77], in which Lord Hope said that the entitlement to information under FOIA is qualified in respects that are equally significant and to which appropriate weight must also be given; and that the scope and nature of the various exemptions play a key role with FOIA's analytical framework.

34. Turning to the balancing exercise carried out by the FTT in the present case, Mr Eadie advanced the following criticisms. First, he criticised the table of "Interests served by disclosure" in paragraph [90] of the FTT's decision on the grounds that it is not possible to see the basis for the stated impact, either in terms of the evidential basis for the stated impact or in terms of the reasoning of the FTT underlying the adjectival description of the impact – "positive", "high", "significant" and so forth.

35. He referred to the evidence given by Sir Alex Allan and Mr Macnaught. Mr Eadie summarised their evidence as being that the disclosure of Ministerial internal working diaries would not assist the understanding of the processes of government and would be liable to mislead and misinform the public as to the efficiency and extent of the work of the Minister.

36. Mr Eadie accepted that the FTT was, nevertheless, entitled to conclude, as it did at the end of paragraph [86] of its decision, that the diary:

> "would provide significant information about that part of the Minister's workload which consisted of engagements, and to some extent would reveal the broad topics on which the Minister was spending time at meetings."

37. Mr Eadie further submitted that it was not possible to see the basis for, and there was no explicit reasoning of the FTT justifying, the connection between that short

conclusion and the adjectival description of the impact of disclosure in respect of each of the "interests served by disclosure" specified in the table in paragraph [90] of the FTT's decision; and, indeed, the same objection could be made in respect of the identification of some of the interests said to be so served.

38. Mr Eadie's next criticism was that there was insufficient reasoning supporting and explaining the FTT's conclusion on the balancing exercise in paragraph [110] of its decision, namely that:

> "In our judgment, in agreement with the conclusion maintained by the Commissioner, the balance comes down on the side of disclosure, albeit not by a particularly large margin."

39. That criticism arises out of the fact that the balancing exercise was conducted by reference to the very brief adjectival descriptions of the impact on the interests served by disclosure, on the one hand, and of the severity and likelihood of the claimed impacts on "the interests served by maintaining one or more of the exemptions", on the other hand. Mr Eadie submitted that there were fairly light interests served by disclosure, on the one hand, and some significant harm likely to result from disclosure, on the other hand. He said that there was no more than a statement of the FTT's conclusion on the balancing exercise and it is impossible to know how they reached that conclusion. He said that the reason why there ought to have been a clearer analysis of how the balancing exercise was carried out was that the FTT took into account, in carrying out that exercise, general benefit from disclosure while requiring there to be shown evidence of specific harm or damage said to result from disclosure: there was no analysis of how the two could be compared and balanced against each other.

Ground (3)

40. Turning to Ground (3) of the appeal, Mr Eadie said the question whether the Department "holds" the relevant information for the purposes of FOIA must be determined by reference to each entry or separate piece of information in the diary. The question, he said, is whether there is a sufficient connection between each such piece of information and the Department's functions.

41. Mr Eadie submitted that, on that approach, entries relating to constituency and personal matters were never "held" by the Department. He pointed out that, consistently with that analysis, the Government's Explanatory Notes stated, in relation to section 3(2), that a Department does not "hold" a Minister's constituency papers kept by the Minister in the Department.

42. Mr Eadie further submitted that, once the entries became "historic", they were no longer held by the Department because there was no longer a sufficient connection between the entries and the Department's functions. It was unclear whether the Department's contention was that the entries became historic once the diarised events had occurred or only after Mr Lansley ceased to be a Minister.

Discussion

Ground (1)

43. Neither side before us dissented from the following description by the UT in the APPGER case at [149] as to 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 it 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."

44. I do not accept the Department's criticism that the exercise carried out by the FTT was so lacking in its reasons that it should have been set aside by the UT.

45. It is true that at paragraph [48(b)] of their decision the FTT said that in many cases it would not be realistic or appropriate to require the requester or the Commissioner to spell out in great detail the particular benefits of disclosure since, underlying FOIA, is an assumption that there is a general public interest in the transparency of public authorities, and furthermore disclosure is generally in the public interest because it promotes transparency, accountability, public confidence, public understanding, the effective exercise of democratic rights, and other related public goods. Furthermore, reference to that underlying assumption was repeated in paragraph [75] of the FTT's decision. It is also true that the FTT stated that the potential harms of disclosure, and hence the particular benefits of maintaining an exemption may be very specific.

46. I agree with the reservations of Charles J in the UT about the observation of the FTT in paragraph [48(b)] of their decision about the absence of any need in many cases for the requester or the Commissioner to spell out or explain in any detail the particular benefits of disclosure. I agree with Charles J that, when a qualified exemption is engaged, there is no presumption in favour of disclosure; and that the proper analysis is that, if, after assessing the competing public interests for and against disclosure having regard to the content of the specific information in issue, the decision maker concludes that the competing interests are evenly balanced, he or she will not have concluded that the public interest in maintaining the exemption (against disclosure) outweighs the public interest in disclosing the information (as section 2(2)(b) requires). That is a different issue from the need for the public authority, wishing to rely on an exemption, to satisfy the Commissioner and, on appeal, the FTT that there is an exemption which applies.

47. I also agree with Charles J that, having regard to the FTT's decision as a whole, it is clear that the FTT did not carry out the public interest balancing exercise by applying a generalised presumption in favour of disclosure. The FTT expressly said (at para. [74] quoted above), for example, that, given the extent of the evidence adduced,

theoretical points about whether the relevant exemptions in section 35 either have or lack inherent or presumptive weight did not materially affect the decisions the FTT had to make.

48. More particularly, the FTT actually identified 11 particular types of benefit from disclosure of the requested information in issue. While some were of a fairly general nature ("general value of openness" and "transparency in public administration"), all the others were specific and linked to the particular information requested. As appears from the FTT's decision at paragraph [76], they were all based on matters identified by, and addressed by, Sir Alex Allan and Mr Macnaught in their witness statements.

49. I reject, therefore, the Department's criticism that the benefits from disclosure identified in the table in paragraph [90] of the FTT's decision were not based on the evidence and that, by contrast with the different elements of harm or potential harm identified in paragraph [109], they were merely of a general nature associated with any disclosure of information by a public body.

50. Nor do I accept the Department's criticism that there is insufficient reasoning of the FTT to support the evaluation of the significance of those benefits in the second column in paragraph [90]. The FTT's assessment of the evidence in relation to those various heads of benefit can be seen and understood by reference to paragraphs [78] to [90] of the FTT's decision, in which the FTT analysed and rejected much of the written and oral evidence of Sir Alex Allan and Mr Macnaught in relation to them.

51. Finally, under Ground (1) of the appeal, I reject the Department's criticism that there was insufficient reasoning supporting and explaining the FTT's conclusion on the balancing exercise in favour of disclosure. Having identified the particular types of benefit and harm that would be or might be generated by disclosure and attributed a weighting to them, including an assessment of the severity and likelihood of the claimed impact, the FTT had to carry out an evaluative balancing exercise. This they did in paragraph [110] as follows:

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

> the Commissioner, the balance comes down on the side of disclosure, albeit not by a particularly large margin. In our view this is so whether the exemptions are considered singly or cumulatively."

52. I do not consider that anything further was required in the present case to explain and justify the conclusion of the FTT that the balancing exercise favoured disclosure.

Ground (3)

53. I reject the Department's argument that it does not hold the information for the purposes of the FOIA for reasons which I can state quite briefly.

54. I agree with the Department that the question whether it holds the information must be judged in relation to each entry, or piece of information, in the diary. Furthermore, it was common ground before us that, in agreement with Upper Tribunal Judge Wikeley's observations in *University of Newcastle upon Tyne v IC and BUAV* [2011] UKUT 185 (AAC), there must be an appropriate connection between the information and the Department so that it can properly be said that the information is held by the Department.

55. It seems obvious that, subject to any absolute or qualified exemptions in FOIA, the information in the diary was "held" by the Department for the purposes of the FOIA during such time as Mr Lansley was a Minister in the Department, whether or not the diarised events had already occurred. The information related to one or more of the matters identified in section 35(1). It was set up and maintained by the Department and at its cost. At the very least the diary was, as Mr Eadie said in his oral submissions, an efficiency tool to enable the Department, particularly no doubt the Minister's private office, and the Minister, to know what his upcoming appointments would be, with whom and where, and to facilitate decisions about his availability for other appointments, and also to be a record of what he had done, who he had seen and where, should those matters become relevant to Mr Lansley's Ministerial functions and his private office after the diarised events had occurred.

56. Plainly, therefore, while Mr Lansley was a Minister in the Department, for the purposes of section 3 of FOIA the entries in the diary were held by the Department for itself even if they were also held (in the case of personal or constituency matters) for Mr Lansley as well.

57. I cannot see that the termination of Mr Lansley's Ministerial position made any difference to that position. I do not see that the entries suddenly became held for Mr Lansley alone for the purposes of section 3(2)(a) of FOIA. In particular, it seems to me clear that it remained relevant or potentially relevant to the Department to know, as a matter of historical record, where Mr Lansley had been and with whom on particular occasions, should there be a political, journalistic or historical interest raised with the Department in relation to those matters.

<u>Conclusion</u>

58. For all those reasons I would dismiss this appeal.

Lady Justice Black:

59. I agree.

Lord Justice Davis:

60. I also agree.