Trinity Term
[2025] UKSC 27
On appeal from: [2023] EWCA Civ 1378

JUDGMENT

Department for Business and Trade (Respondent) *v* The Information Commissioner (Appellant)

before

Lord Lloyd-Jones
Lord Sales
Lord Burrows
Lord Richards
Sir Declan Morgan

JUDGMENT GIVEN ON
23 July 2025

Heard on 28 January 2025

Appellant
Timothy Pitt-Payne KC
Peter Lockley
(Instructed by Information Commissioner's Office (Cheshire))

Respondent
Sir James Eadie KC
Robin Hopkins
(Instructed by Government Legal Department)

Intervener – Brendan Montague
Christopher Knight
Sam Fowles
(Instructed by Leigh Day (London))

LORD SALES AND LORD BURROWS (with whom Lord Lloyd-Jones agrees):

1. Introduction

1. The Freedom of Information Act 2000 ("FOIA") was a landmark statute. It created a general right of access to information held by public authorities. That general right comprises two specific rights: a right to be informed whether the information requested is held by the public authority (with a correlative duty to confirm or deny this) and, if so, a right to have disclosure of that information (with a correlative duty to disclose that information). Both those rights are limited by provisions that exempt certain types of information from the duty to confirm or deny whether the information is held or from the duty to disclose the information. The exemptions are either absolute or qualified and they apply, in a similar way, to each of the two rights. In respect of the duty to disclose information, with which this appeal is concerned, an absolute exemption means that that type of information does not need to be disclosed. A qualified exemption means that that type of information does not need to be disclosed if, as laid down in section 2(2)(b) of FOIA, "the public interest in maintaining the exemption outweighs the public interest in disclosure of the information".

2. The question raised in this appeal is, what is the correct approach under section 2(2)(b) where the item of information in question involves more than one qualified exemption? The appellant argues that each qualified exemption must be assessed independently (or, as it was put by counsel for the respondent Department for Business and Trade, perhaps somewhat pejoratively, as if in a "silo"). That is, the public interest evaluation must be carried out without regard to there being another qualified exemption in play. The Secretary of State argues that, where there is more than one qualified exemption in play, the qualified exemptions should be looked at cumulatively (or in aggregate or holistically or in combination) so that the public interest assessment should take into account the public interest against, and the public interest for, disclosure of the information across all the qualified exemptions that are in play. For shorthand, we will refer to these as, respectively, the "independent" and the "cumulative" approaches.

3. It may be queried how significant the difference between those two approaches is likely to be in practice. Nevertheless, the premise of the appeal, accepted by both sides, is that it will make a difference in some cases even if those are rare cases; and it is further accepted that the difference in approach would make a difference as to whether information is required to be disclosed on the facts of this case.

2. The facts and the decisions below

4. In November 2017, prior to the withdrawal of the UK from the European Union, Brendan Montague, a journalist, requested information about trade working groups that

had been set up to look at post-Brexit arrangements by the Department for International Trade, now the Department for Business and Trade ("the Department"). Some of the requested information was disclosed, but the Department refused to disclose the remainder. The most significant part of the information which was withheld comprised information contained in the agendas and minutes of the meetings of the trade working groups ("the withheld information"). The Department relied on the public interest arising from two provisions in FOIA: section 27, which provides that information is exempt if disclosure would be likely to prejudice international relations, and section 35, which provides that information is exempt if it relates to the formulation of government policy.

5. Mr Montague complained to the Information Commissioner under section 50(1) of FOIA. By a decision notice dated 29 March 2019 the Information Commissioner upheld the Department's decision not to disclose. At this stage, the distinction between the independent and the cumulative approaches was not identified as something material to the outcome of Mr Montague's request. Mr Montague appealed to the First-tier Tribunal ("the FTT") pursuant to section 57(1) of FOIA.

6. The FTT (His Honour Judge Shanks, Stephen Shaw and Pieter de Waal) allowed the appeal in certain limited respects: EA/2019/0154. But in the material part of its decision so far as the appeal to this court is concerned, the FTT dismissed Mr Montague's appeal in relation to the withheld information. The FTT itself raised the question as to whether the independent approach or the cumulative approach was correct. It held that the cumulative approach applied, so that the public interest in different exemptions could be aggregated. It concluded that, applying section 2(2)(b) of FOIA, the public interest recognised in sections 27 and 35 of FOIA together outweighed the public interest in disclosure of the withheld information.

7. Mr Montague's appeal against that decision was allowed by the Upper Tribunal (Judges Wikeley, Wright and Church): [2022] UKUT 104 (AAC); [2023] 1 WLR 1565. The Information Commissioner joined Mr Montague in arguing that the independent approach should be applied, albeit in the Information Commissioner's contention, whichever of the two approaches was taken, the outcome should still be that the withheld information should not be disclosed. The Department submitted that the cumulative approach was correct. The Upper Tribunal held that FOIA required the independent approach to be applied, so that the aggregation of separate public interests in non-disclosure was not permitted. Rather, the public interest recognised in each individual statutory provision exempting information had to be weighed separately against the public interest in disclosing the information. Accordingly, the Upper Tribunal held that the FTT had made an error of law and decided that the case should be remitted to be considered by the FTT afresh, applying the independent approach.

8. The Department appealed against that decision to the Court of Appeal (Bean, Andrews and Lewis LJJ) with the Information Commissioner and Mr Montague being

the respondents. The sole issue was whether the Upper Tribunal had been wrong to reject the cumulative approach. The Court of Appeal held that it had been wrong in so doing and allowed the appeal: [2023] EWCA Civ 1378; [2024] 1 WLR 2185. The leading judgment was given by Lewis LJ. Andrews LJ gave a concurring judgment. Bean LJ agreed with both judgments.

9. The Information Commissioner now appeals to the Supreme Court with the Department as respondent and Mr Montague as intervener.

3. Relevant provisions of FOIA

10. Part I of FOIA is headed "Access to Information held by public authorities". Section 1, so far as material, provides 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 … provisions of sections 2 …
>
> (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as 'the duty to confirm or deny'."

11. Section 2 is in the following terms:

> "**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.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

(a) section 21,

(b) section 23,

(c) section 32,

(d) section 34,

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords,

(ea) in section 37, paragraphs (a) to (ab) of subsection (1), and subsection (2) so far as relating to those paragraphs,

(f) section 40(1),

(fa) section 40(2) so far as relating to cases where the first condition referred to in that subsection is satisfied,

(g) section 41, and

(h) section 44."

12. Section 17 of FOIA (which appears in Part I) deals with a refusal of a request by a public authority. The material parts provide:

"**17 Refusal of request**

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

...

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such

time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, 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 authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

13. Part II of FOIA is headed "Exempt Information". It contains a series of sections providing that, in certain specified circumstances, information is "exempt information". The sections that have been relied on by the Department in respect of the present appeal are sections 27 and 35. But we also set out below (because we later refer to them in our reasoning) sections 22, 22A, 28 and 29.

"**22 Information intended for future publication**

(1) Information is exempt information if—

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).

22A Research

(1) Information obtained in the course of, or derived from, a programme of research is exempt information if—

(a) the programme is continuing with a view to the publication, by a public authority or any other person, of a report of the research (whether or not including a statement of that information), and

(b) disclosure of the information under this Act before the date of publication would, or would be likely to, prejudice—

(i) the programme,

(ii) the interests of any individual participating in the programme,

(iii) the interests of the authority which holds the information, or

(iv) the interests of the authority mentioned in paragraph (a) (if it is a different authority from that which holds the information).

(2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)(b).

27 International relations

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State,

(b) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

(4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)—

(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(5) In this section—

'international court' means any international court which is not an international organisation and which is established—

(a) by a resolution of an international organisation of which the United Kingdom is a member, or

(b) by an international agreement to which the United Kingdom is a party;

'international organisation' means any international organisation whose members include any two or more States, or any organ of such an organisation;

'State' includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

28 Relations within the United Kingdom

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.

(2) In subsection (1) 'administration in the United Kingdom' means—

(a) the government of the United Kingdom,

(b) the Scottish Administration,

(c) the Executive Committee of the Northern Ireland Assembly, or

(d) the Welsh Assembly Government.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

29 The economy

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the economic interests of the United Kingdom or of any part of the United Kingdom, or

(b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

35 Formulation of government policy, etc

(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

...

(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—

'government policy' includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Assembly Government;

'the Law Officers' means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General to the Welsh Assembly Government and the Attorney General for Northern Ireland ;

'Ministerial communications' means any communications—

(a) between Ministers of the Crown,

(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

(c) between members of the Welsh Assembly Government

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the Cabinet or any committee of the Cabinet of the Welsh Assembly Government;

'Ministerial private office' means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a

> Northern Ireland junior Minister or any part of the administration of the Welsh Assembly Government providing personal administrative support to the members of the Welsh Assembly Government;
>
> 'Northern Ireland junior Minister' means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."

14. Part IV of FOIA deals with enforcement. Section 50 provides that a person may apply to the Information Commissioner for a decision on whether a request has been dealt with in accordance with the requirements of Part I of FOIA. The person making the request is referred to in FOIA as "the complainant". The Information Commissioner may, amongst other things, serve a notice of his decision on the complainant and the public body concerned.

15. Part V of FOIA deals with appeals. Section 57 of FOIA provides for a right of appeal by a complainant or public authority against a decision notice served by the Information Commissioner. An appeal may simply be allowed or a different decision notice may be substituted (see section 58 of FOIA).

4. Understanding the general scheme of FOIA

16. As has been mentioned in para 1 above, and as has been set out in para 10 above, section 1(1) creates two distinct rights for a person who requests information they believe is held by a public authority: (i) a right to be informed by the public authority whether it holds information of the description specified in the request (section 1(1)(a), which is the right that correlates to what is referred to in section 1(6) as "the duty to confirm or deny"); and (ii) a right to have that information communicated to them (section 1(1)(b), which, although the Act does not say this in terms, correlates to a duty to disclose that information). Section 1(2) makes it clear that subsection (1) has effect subject to section 2, among other provisions.

17. In this case, we are directly concerned only with the right under section 1(1)(b) but, nevertheless, it is clear that that subsection must operate coherently with section 1(1)(a). This is particularly so because the exemptions in Part II apply to both the right under section 1(1)(a) and the right under section 1(1)(b).

18. It is important to clarify what is meant by an exemption in FOIA. The exemptions are set out in Part II of the Act (see para 13 above). The exemptions describe types of information. That is, the exemptions lay down that the information described is exempt

information. For example, in this case the information is exempt if it would prejudice relations between the UK and any other State (section 27(1)(a)) or if it relates to the formulation or development of government policy (section 35(1)(a)). Other examples are those in section 22 (information intended for future publication), section 22A (research), section 28 (relations within the UK) and section 29 (the economy).

19. As we have said, some exemptions are absolute and some exemptions are qualified. Where the exemption is absolute, the public authority need not disclose anything: there is no duty to confirm or deny (see section 2(1)(a)) and there is no duty to disclose the information (see section 2(2)(a)). On the facts of this case, it is clear, and is not in dispute, that we are solely concerned with the qualified exemptions and not with an absolute exemption.

20. In relation to the types of information identified as exempt information, as listed in Part II, the provisions in Part II which constitute qualified exemptions do not state on their face that they define the public interest in any way. However, it can be seen that they not only describe particular types of information but, at one and the same time, specify a reason for neither confirming nor denying that that the information is held and for not disclosing that information (eg because the information would prejudice relations between the UK and any other State). That specified reason explains why the information is exempt. Where the exemption is qualified, the specified reason explains why there is a public interest in non-disclosure of that information (or for not confirming or denying that the information is held) but that may be outweighed by the public interest in disclosure.

21. To put it another way, it is clearly possible to infer from each exemption that it refers to a certain aspect of the public interest. For example, section 22 refers to information being held with a view to future publication where it is reasonable in all the circumstances that the information should be withheld from disclosure until the date of proposed publication. This is therefore referring to a public interest in allowing the public authority to control the timing of its publication. In this way, in the case of each provision in Part II which sets out a qualified exemption, the interest which it reflects has been specifically recognised by Parliament as a significant aspect of the public interest which is in principle capable of outweighing the right to disclosure of that information (or the right to be informed whether the information is held) in relation to a particular item of information.

22. In some of the provisions, such as section 22A(1)(b) and section 27(1), a number of different but closely related exemptions are set out which reflect different aspects of the public interest which militate against disclosure of the information (or against confirming or denying that the information is held). As well as an element of overlapping of aspects of the public interest which is internal to certain provisions (such as sections 22A(1)(b) and 27(1)), there is obvious scope for aspects of the public interest reflected in different sections in Part II to overlap as well.

23. It is significant that FOIA does not lay down a regime whereby, if the public authority can show that the information falls within one of the qualified exemptions, there is no need to disclose it if the public interest in non-disclosure of the information (assessed in a completely open-ended way) outweighs the public interest in disclosure of the information. The qualified exemptions are not gateways to a general analysis of the public interest against and for disclosure of the information. In that sense, as both parties accepted, FOIA does not lay down an open-ended public interest assessment. Rather, the qualified exemption regime imposes a structured and transparent scheme whereby the public authority must analyse which of the qualified exemptions are being relied on and must conduct an evaluative public interest exercise in respect of the qualified exemption, or exemptions, that is or are in play. Having said this, it is also common ground, and is clear, that the aspects of the public interest which may feature on the disclosure side of the public interest exercise under section 2(2)(b) (and 2(1)(b)) are not closed and that a cumulative approach applies in relation to them.

24. However, this analysis leaves open whether, where there is more than one qualified exemption in play, the structured and transparent scheme should be conducted with respect to each qualified exemption viewed independently of each other or whether instead the qualified exemptions should be viewed cumulatively, so that the aspects of the public interest in favour of non-disclosure (or of disapplying the confirm or deny duty) reflected in the applicable exemptions are added together for the purpose of undertaking the public interest exercise under section 2(2)(b) (and 2(1)(b)).

5. Pin-pointing the precise issue on this appeal

25. Some of the difficulty in this appeal lies in pinpointing the precise difference between the independent and cumulative approaches. The following abstract example may help. Let us assume that the information in question triggers two qualified exemptions. In respect of qualified exemption 1, the public interest in non-disclosure of the information comprises factor (a). Looking at exemption 1 independently, factor (a) does not outweigh the public interest in disclosure of the information. In respect of qualified exemption 2, the public interest for non-disclosure of the information comprises factor (b). Looking at exemption 2 independently, factor (b) does not outweigh the public interest in disclosure of the information. But if one looks at both exemption 1 and 2 together, the public interest factors (a) and (b) taken together do outweigh the public interest in disclosure of the information. The question is whether that cumulative approach should be applied so that the information need not be disclosed.

26. To give another hypothetical but non-abstract example, let us assume that the information requested is of the information contained in the UK Government's minutes of internal meetings for working out a strategy for trade negotiations between the UK Government and another state. The UK Government wants the best deal it can get overall, but it does not know where the other state might be inclined to be difficult or generous,

has to consider carefully what might cause irritation, and does not want to reveal its negotiating tactics. At the same time, the UK Government's objectives in negotiating the deal have to take account of how particular parts of the deal might impact on different countries within the UK: eg should the UK Government press for a special deal in relation to Scotch whisky which will benefit Scotland more than England, or on financial services which will have the reverse effect? And on top of that, the UK Government has to consider its industrial policy (eg whether to press for special terms on transfer of AI technology) and its regional policy (should it press for particular forms of trade benefit which are likely to support its levelling up agenda generally and/or in relation to, say, the North East?). The internal consideration bearing on these issues may well also involve information the disclosure of which would be likely to prejudice the economic interests of the UK or the financial interests of one or more of the administrations in the UK. Moreover, the Government has to consider its overall policy as to how all these moving parts should fit together in a coherent negotiating strategy.

27. It would appear that the requested internal Government information on all these issues is information that falls within one or more of the qualified exemptions under section 27(1), headed "international relations" (which sets out a number of distinct exemptions); section 28, headed "relations within the UK"; section 29, headed "the economy" (which sets out two distinct exemptions); and section 35(1)(a), headed "formulation of government policy, etc". This is therefore a situation where more than one qualified exemption is in play in relation to the information in question.

28. The issue on this appeal is whether one must assess each of those qualified exemptions independently or, once all the relevant exemptions have been identified in relation to a particular item of information, can all aspects of the public interest in favour of non-disclosure of the information under the identified exemptions be brought into account in answering the question, does the public interest in maintaining the non-disclosure of the information outweigh the public interest in disclosing the information?

6. The main submissions on interpreting FOIA

29. The determination of this appeal depends on the proper interpretation of FOIA. It is therefore a question of statutory interpretation. It is well-settled that the correct approach to statutory interpretation is to ascertain the meaning of the words used in a statute in their context and in the light of the purpose of the statutory provision(s).

30. In general terms, the Information Commissioner and Mr Montague point to the separate provisions dealing with exemptions, one by one; and make the point that, if the cumulative approach were correct, it would have been easy for the drafter to have included a provision laying down that a cumulative approach should be adopted. They also point to specific wording that they argue supports the independent approach. In

particular, they argue that section 2(2)(b) (which provides that the right to have the information disclosed does not apply if "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information") is referring to maintenance of the effect of the particular provision laying down the qualified exemption. They further submit that the cumulative approach will lead to greater non-disclosure of information, contrary to the purpose of the statute, and will be difficult to operate in practice.

31. In contrast, the Department argues that there is nothing in the wording or structure of FOIA that favours the independent as against the cumulative approach. On the contrary, the wording and structure indicate that the cumulative approach is correct. It further submits that the lack of any express provision on cumulation takes the Information Commissioner and Mr Montague nowhere because one can equally well say that there is no express provision denying cumulation. Furthermore, the cumulative approach is straightforward to apply in practice and leads to less practical difficulty than the independent approach would do. The Department also submits that, as held by the Court of Appeal, section 2(2)(b) is not best interpreted as focusing on maintaining a particular provision but rather on maintaining non-disclosure of the information, ie it is concerned with the exempt status of the information.

32. But the principal submission made by Sir James Eadie KC, counsel for the Department, focuses on what Lewis LJ said in the Court of Appeal at para 37 in respect of the central provision (section 2(2)(b)) on qualified exemptions:

> "As [section 2(2)(b)] is concerned with the public interest in maintaining the exemption of the information from disclosure, the natural inference is that it permits the decision-maker to weigh the combined, or aggregated, public interest reflected in the different applicable provisions of Part II. There is no reason why the public interest underlying each one of the provisions conferring non-absolute exemption should be considered separately in deciding whether the public interest in maintaining the exemption of the information from disclosure outweighs the public interest in disclosure. Rather, the natural inference is that Parliament would have expected all the relevant aspects of the public interest recognised in the applicable provisions of Part II to be considered when deciding whether the public interest in maintaining the exemption of the information from disclosure outweighed the public interest in disclosure. On a proper interpretation, therefore, section 2(2)(b) of FOIA permits the public interest recognised in two or more different provisions in Part II to be assessed in combination or aggregated in determining whether the public interest in

> maintaining the exemption of the information from disclosure outweighs the public interest in disclosure."

33. As Sir James Eadie put the point, why would Parliament, in an exercise concerned with weighing the public interest for and against disclosure of particular information, require that the overall public interest, in non-disclosure of the information under the identified qualified exemptions, should not be taken into account?

7. The proper interpretation of FOIA

34. We do not suggest that the interpretation put forward by the Information Commissioner and Mr Montague is an impossible one to take. But in our view, it is not the correct interpretation and, in general terms, we agree with the submissions of the Department.

35. It is particularly important to have in mind that one is ultimately concerned under section 2(2)(b) with a public interest assessment. Given that that is so, it is a natural inference, because it enables a more complete and accurate picture of the public interest to be obtained, that all the specified public interest reasons for non-disclosure of the information, under the identified qualified exemptions, ought to be taken into account and weighed against the public interest favouring disclosure of the information. One is otherwise ignoring relevant public interest considerations against disclosure of the information even though they have been specified in FOIA as reasons for non-disclosure of the information. Put another way, unless the words contradict this, why should the public authority be required to examine the qualified exemptions with only a part of the overall picture of the public interest reflected in the qualified exemptions in mind? All the qualified exemptions reflect aspects of the public interest in favour of non-disclosure of the information which Parliament has specifically considered should in principle be capable of justifying the non-disclosure of that information, so it is not plausible to infer that Parliament's object is that some aspects of the public interest which can be seen to be applicable in a particular case should nonetheless be left out of account. It follows from this that we strongly agree with the central reasoning of Lewis LJ set out in para 32 above.

36. For information covered by a qualified exemption, the application of section 2(1) needs to be considered in relation to the right to be informed whether the information is held under section 1(1)(a) and the application of section 2(2) needs to be considered in relation to the right to have the information disclosed under section 1(1)(b). The scheme of section 2(1) and the scheme of section 2(2) is the same, with due allowance for the different duties involved (the duty to confirm or deny and the duty to disclose the information). It is natural to interpret them together in light of the fact that they are aligned in this way and that each of them operates to disapply the relevant right in section 1(1)(a) and (b) respectively. Nevertheless, as this case is concerned with the right under section

1(1)(b), rather than the right in section 1(1)(a), we shall focus primarily on the right under section 1(1)(b).

37. The crucial provision is therefore section 2(2). In relation to a qualified exemption and the right to disclosure of the information in section 1(1)(b), it provides that "in respect of any information which is exempt information by virtue of any provision of Part II" (that is to say, where that information is identified as "exempt information" according to the list in Part II), then:

> "section 1(1)(b) does not apply, if or to the extent that ... in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

There are several textual indications in section 2(2) that the cumulative approach is to be preferred.

38. The first is that in section 2(2)(b) the focus is on "any provision of Part II". The wording is not "a" provision of Part II. If the correct approach is to focus exclusively on one particular provision separately from the others, there would have been no good reason for the word "any" to have been used instead of the word "a". Put another way, "any provision" is referring to "one or more provisions". One might even say that this is supported by the general stipulation in section 6 of the Interpretation Act 1978 that the singular includes the plural.

39. Secondly, the words "in maintaining the exemption" are naturally read as meaning the maintenance of the exemption from the duty to disclose the information and not as a reference to one particular provision: ie the exemption being referred to is the exempt status of the information. The words Parliament has used indicate that one is to have regard to the overall result of the public interest evaluation exercise that the information in question should not be disclosed. Had the exemption been referring only to the particular provision that exempts the information, the more natural wording would have been "in maintaining the effect of the provision".

40. Thirdly, "the public interest in maintaining the exemption" is naturally read as referring to the public interest across all the relevant provisions. While it is not an open invitation to take into account aspects of the general public interest in favour of non-disclosure outside the aspects of the public interest in favour of non-disclosure specified and recognised by the relevant provisions of FOIA, it is a strained interpretation to read that reference to the public interest as confined to the public interest viewed separately in respect of each provision.

41. Fourthly, what is required to be balanced under section 2(2)(b) is "the public interest" in maintaining exclusion of the duty of disclosure on the one side and "the public interest" in disclosure of the relevant information on the other. That balancing requires an evaluation of the strength of the public interest for and against disclosure. It is common ground that "the public interest" in disclosure may have various aspects which are contributory factors in evaluating its strength (eg it would be relevant if the information related to wrongdoing by the public authority which ought to be exposed to public scrutiny). Where two or more exemptions, reflecting different aspects of the public interest in non-disclosure of information, apply in relation to a particular item of information, it is a natural inference that they all have to be brought into account to evaluate the strength of the public interest in non-disclosure.

42. Fifthly, the balance to be struck pursuant to section 2(2)(b) is between two aspects of "the public interest", so that it is inherent in the exercise that different aspects of the public interest are to be brought into account. There is no good reason to exclude consideration of multiple relevant factors bearing on the public interest on one side of the balancing assessment of where the overall public interest lies whilst taking all relevant factors bearing on the public interest into account on the other side of the balance. Indeed, the reason for bringing into account all relevant aspects of the public interest on the non-disclosure side of the balance is particularly strong, because they have all been recognised and endorsed by Parliament in Part II as relevant to the question of exemption from disclosure. As Sir James Eadie submitted, to construe "the public interest" in favour of non-disclosure of information as having only one aspect, as reflected in one exemption, as required by the independent approach, even though in fact two or more aspects of the public interest are relevant in relation to that information, as reflected in the two or more exemptions which apply to it, would be unjustifiably unbalanced and would involve an inaccurate overall assessment of "the public interest" in relation to that information.

43. Finally, the opening words of section 2(2)(b) ("in all the circumstances of the case") should be given weight. If more than one exemption applies to particular information, it is clear that several aspects of the public interest in favour of non-disclosure, as recognised by Parliament, apply in relation to it. Those constitute part of the circumstances of the case which, by application of the opening words, have to be considered. By contrast, on the independent approach, it is unclear what those words would add, since the remaining words of the provision necessarily mean that the public interest in non-disclosure, as set out in the provision in Part II which is treated as the trigger for the particular analysis, would have to be brought into account in the weighing exercise. The Court of Appeal considered that the opening words were neutral as between the cumulative approach and the independent approach. We do not agree. They point in favour of the cumulative approach.

44. We reiterate the important point that, while our focus has been on the right to have the information disclosed under section 1(1)(b) and the exemption under section 2(2)(b), a consistent interpretation is straightforwardly applicable in respect of the exclusion of

the duty to confirm or deny set out in section 1(1)(a) and section 2(1)(b). The structure of section 2(1)(b) and 2(2)(b) and the effect of the balancing exercise under each of them is the same. The same language is used in both of them, with due allowance for the different duty (the duty to confirm or deny and the duty to disclose the information) with which each of them is concerned. The phrase "maintaining the exemption" in section 2(2)(b) corresponds with "maintaining the exclusion of the duty to confirm or deny" in section 2(1)(b), leading to disapplication of the relevant duty under section 1(1)(b) and section 1(1)(a), respectively. Again, the opening words of section 2(1)(b) are "in all the circumstances of the case".

45. Perhaps more debatable are the words "the effect of the provision" in section 2(1). It is not clear what the words "of the provision" add. We do not think they provide significant support for the independent approach. The points we have made above on section 2(2) apply analogously to section 2(1) and cannot be outweighed merely by reference to these words. In particular, the opening emphasis in section 2(1) is again on "any provision", which is naturally read as referring to one or more provisions. We therefore consider, applying the singular as embracing the plural, that "the provision" covers "provisions" so that section 2(1) is referring to "the effect of the provision or provisions". It is noteworthy that, in this respect, section 2(1)(b) goes on to talk of "the public interest in maintaining the exclusion of the duty to confirm or deny" (rather than the public interest as stated in a particular provision). This is naturally read as meaning the maintenance of the exclusion of the duty to confirm or deny set out in section 1(1)(a) and not as a reference to one particular provision in Part II: ie the exclusion being referred to is, again, the excluded status of the information held. Had the exclusion been referring to the particular provision that excludes the duty to confirm or deny, the more natural wording would have been "in maintaining the effect of the provision". But even then, we would suggest that the singular embraces the plural. Nor, in any event, do we see any difficulty with the reliance in section 2(1)(a) on "the provision" because section 2(1)(a) is referring only to an absolute exemption and where a single provision applies which is an absolute exemption that is sufficient in and of itself for the duty to confirm or deny to be excluded.

46. In our view, the wording of section 2(1)(b) makes it clear in relation to the duty in section 1(1)(a) that what is in issue is the overall result to which the public interest balancing exercise gives rise, namely should "the public interest in maintaining the exclusion of the duty to confirm or deny" be regarded as outweighing the public interest in disclosing whether the public authority holds the information. On the basis of coherence of approach between section 2(1) and section 2(2), this supports our view regarding the proper interpretation of section 2(2). In both cases, the words Parliament has used indicate that one is to have regard to the overall result of the public interest evaluation exercise: see para 39 above.

47. Finally on the words in FOIA, we should refer to section 17. It follows the structure of section 2(1) and (2) and is consistent with the view that the cumulative approach is

correct. Section 17(1) contemplates that a public authority may rely on a claim that several of the provisions in Part II apply in relation to a particular item of information so as to bring into question whether the duty to confirm or deny or, if held, to disclose the information is applicable or whether the information is "exempt information" (that is, information which is exempt from disclosure), and in relation to each provision in Part II relied upon must "specif[y] the exemption in question" (meaning which provision in Part II, whether a qualified or an absolute exemption, operates as the trigger for application of section 2(1) and section 2(2)). The notice given by the public authority can specify a series of exemptions which apply. Such a notice will give rise to the need to consider their cumulative effect, as explained above.

48. Section 17(3) states that where the public authority "is to any extent" relying on section 2(1)(b) or section 2(2)(b), ie in respect of a qualified exemption, it must state the reasons for claiming that "in all the circumstances of the case" the public interest in maintaining the exclusion of the duty to confirm or deny (that is, the exclusion of the duty in section 1(1)(a)) or in maintaining the exemption (that is, the exemption from the duty of disclosure in section 1(1)(b)). Where multiple exemptions in Part II are relied upon in relation to both duties, this means that the reasons given should set out the relevant reasons according to the cumulative approach for maintaining each such claim.

49. Moving on from these textual matters, we disagree with the submission of the Information Commissioner and Mr Montague that the cumulative approach will be more difficult to apply than the independent approach. On the contrary, where more than one qualified exemption is in play, it will straightforwardly allow those conducting the public interest balancing exercise to take into account all the specified public interest reasons in the identified qualified exemptions favouring non-disclosure of the information and to weigh them against all the public interest factors favouring disclosure of the information.

50. In our view that is a much simpler way to approach the public interest balancing exercise required under both section 2(1)(b) and section 2(2)(b). Applying the cumulative approach, the staff of the public authority (who have to conduct that exercise in the first place), then the Information Commissioner and his or her staff (who have to conduct the same exercise), then the tribunals which have to do the same, are all spared the mental gymnastics which would otherwise be required under the independent approach. Under the independent approach they would have to tease out, and consider separately and seriatim, distinct aspects of the public interest, as though hermetically sealed off from each other, even though in reality they are closely related aspects of the public interest tending in favour of maintaining exemption from disclosure. Consider, for example, the slightly different exemptions (reflecting slightly different aspects of the public interest) in relation to research set out in section 22A, in relation to prejudice to international relations set out in section 27, in relation to the economy set out in section 29 and in relation to policy formation in section 35(1): see para 13 above. It will often be very difficult to separate these out and to give them distinct weightings as aspects of the public interest in non-disclosure.

51. These are just illustrations of a general problem arising from the overlapping nature of the exemptions specified in Part II: see the example given at para 26 above. If the independent approach were followed, not only would the public interest balancing exercise be seriously distorted and inaccurate (see para 35 above), it would also be a minefield replete with the potential for error (and with the potential for argument about whether an error of assessment had been made) at every level at which it was to be conducted.

52. In our view, in establishing by FOIA the new constitutional regime for freedom of information, one of the purposes was to create a system which was not only structured and transparent but was also practically workable and effective, and which could be implemented with a minimum of argument and a minimum of litigation. These considerations reinforce the conclusion based on the language and structure of the relevant provisions that the cumulative approach is correct.

8. A footnote on environmental information

53. The Court of Appeal placed no weight on the Environmental Information Regulations 2004 (SI 2004/339), implementing EU Parliament and Council Directive 2003/4/EC, not least because they came into force after FOIA. In any event, they were based on an EU Directive. Sir James Eadie for those reasons also placed no real weight on the Regulations.

54. Nevertheless, it is noteworthy that, in the context of environmental information, there has been a similar debate as to whether the public interest for and against disclosure of information should be assessed by applying an independent or a cumulative approach. By reason of regulation 12 of the Environmental Information Regulations 2004/339, environmental information must be disclosed unless it falls within "an exception". The exceptions are set out in regulation 12(4) and (5). Where an exception applies, then by regulation 12(1)(b), the public authority may refuse to disclose the environmental information requested if "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information." That wording is identical to that in section 2(2)(b) of FOIA subject to the word "exclusion" being used rather than "exemption".

55. In *R (Office of Communications) v Information Comr* [2010] UKSC 3, [2010] Env LR 20, the question arose as to whether, in applying regulation 12(1)(b), an independent or cumulative approach should be taken. By a 3-2 majority (the majority appeared to include Lord Mance, because he gave the judgment of the Court, but it is otherwise unclear who was in the majority and who was in the minority) the Supreme Court was of the view that a cumulative approach should be taken. But as this ultimately depended on the interpretation of the 2003 Directive and as the matter was not acte clair, all agreed

that a reference should be made to the CJEU on this question. The answer given by the CJEU, *Office of Communications v Information Comr* Case C-71/10, [2011] PTSR 1676, was that the majority view, that a cumulative approach was appropriate, was correct.

56. Although we accept that what we can take from this is limited, not least because the answer turned on a correct interpretation of a Directive that is not in play in our case, there are two points of importance.

57. The first is that, in favouring a cumulative approach, the majority of the Supreme Court and the CJEU must have regarded such an approach as practically workable and appropriate. That tends to go against the submission of Mr Timothy Pitt-Payne KC, for the Information Commissioner, that a cumulative approach will be difficult to apply in practice.

58. The second point is that, although the wording of the Regulation was focused on "an exception" and "the exception", the majority of the Supreme Court (and the Court of Appeal whose decision the majority considered should be upheld) concluded that it was appropriate to interpret those words as referring to more than one exception in applying the public interest test. The judgment of Richards LJ (with whom Waller and Thomas LJJ agreed) in the Court of Appeal, [2009] EWCA Civ 90, at paras 37-38 and 42, on the interpretation of regulation 12(1) is particularly interesting as it mirrors our own reasoning on the correct interpretation of section 2(2)(b) of FOIA.

9. Conclusion

59. For all these reasons, we would dismiss the appeal.

LORD RICHARDS AND SIR DECLAN MORGAN (DISSENTING):

60. We are grateful to Lord Sales and Lord Burrows for setting out the background to this appeal and the relevant provisions of the Freedom of Information Act 2000 ("FOIA" or "the Act") which fall to be interpreted. Their judgment identifies the differences between the interpretation for which the appellant contends, described as the independent approach, and that for which the respondent argues, the cumulative approach.

61. The issue in the appeal arises only in circumstances where there is information sought for disclosure which is relevant to at least two of the sections in Part II of the Act and where the public authority could not rely on any of those sections alone as a basis for withholding the information. Although described as the cumulative approach, it is important to recognise that it is not the case that the public interest in withholding

disclosure based on one section is enhanced as a result of whatever public interest is asserted in another section.

62. In summary, therefore, whereas it is clear that disclosure can be withheld where the public interest arising from one of the sections in Part II is sufficient to outweigh the public interest in disclosure, the issue in the appeal is whether it is also permissible to withhold disclosure where none of the interests protected in Part II is individually sufficient to justify non-disclosure. There is no express power to that effect, but the issue is whether the interpretation of the statute supports the existence of such a power.

63. Although FOIA has been in force for over 20 years, aggregation does not appear to be an issue which has previously arisen in any material way. In that time the Information Commissioner has dealt with over 92,000 complaints against the refusal by public authorities of requests for information (as stated in the Annual Reports of the Information Commissioner for the years 2005/06 to 2023/24). In none of them, it appears, has any public authority relied on this aggregation of public interests. Nor did the Department for Business and Trade ("the Department") in this case. The point surfaced only when the First-tier Tribunal ("the FTT") raised it of its own motion during the hearing before it. Unsurprisingly perhaps, the Department decided to adopt it and succeeded on that ground before the FTT. The FTT's decision was reversed by the Upper Tribunal ("the UT") but reinstated by the Court of Appeal.

64. Although it is suggested that aggregation will make a difference only in rare cases, we respectfully think that, once authoritatively established, it is likely to be raised, albeit unsuccessfully, as a basis for objection to disclosure by public authorities on a regular basis. That it is likely in the end to make a difference only in rare cases might suggest that, as it is not clearly spelt out, aggregation may well not have been in the contemplation of the legislature.

65. It is worth noting at this stage some of the background and the unusual route by which the issue in this appeal has reached this Court.

66. On 15 November 2017, Mr Montague submitted a request to the Department for information in respect of trade working groups established by the Government with certain foreign countries to prepare for post-Brexit trade negotiations. The Department's initial response to Mr Montague's request was to refuse disclosure of the great majority of information requested. It was only after Mr Montague complained to the Information Commissioner, and the Information Commissioner had issued an information notice under section 51 of FOIA following the Department's failure to provide a proper explanation of its decision in response to the Information Commissioner's request, that the Department disclosed a substantial amount of the requested information.

67. The information which it continued to withhold ("the withheld information") principally comprised information contained in agendas for, and minutes of, meetings of the trade working groups. The Department claimed exemption from disclosure of this information on the basis of two qualified exemptions, information likely to prejudice international relations (section 27 of FOIA) and information relating to the formulation of government policy (section 35). (It also relied on the exemption under section 40, as regards the names of some of those attending the meetings, but it is unnecessary to consider this further.)

68. On 29 March 2019, the Information Commissioner issued her Decision Notice in respect of Mr Montague's complaint. She upheld the position ultimately reached by the Department, concluding that each of the relevant exemptions was engaged in respect of the withheld information and that the public interest in maintaining each of those exemptions outweighed the public interest in disclosure of that information. She examined in detail, in 11 pages of her Decision Notice, the competing public interests in disclosure and in non-disclosure under each of the relevant exemptions. She did not aggregate the exemptions, nor had the Department presented its arguments on the basis of any aggregation.

69. Mr Montague appealed to the FTT, which allowed his appeal but only as regards a very limited amount of the information which he had requested. As already noted, the FTT held, disagreeing with the Information Commissioner, that non-disclosure could not be justified on the basis of either section 27 or section 35, if taken separately, but that non-disclosure was justified if the public interest factors which arose separately under each ground and which were not common to both grounds were aggregated.

70. The effect of the FTT's decision was therefore largely to uphold the Information Commissioner's decision, albeit on the basis of aggregation. Before the UT, the Information Commissioner supported the FTT's decision to dismiss Mr Montague's appeal but argued as a matter of principle that the FTT had been wrong on the issue of aggregation. The UT allowed Mr Montague's appeal and held that the FTT had been wrong on aggregation. The only issue on the Department's appeal to the Court of Appeal was the question of aggregation. It is on that issue that the Information Commissioner (not Mr Montague, who is an Intervenor on the appeal) appeals to this Court, although the outcome of the litigation is that the Information Commissioner's original decision against Mr Montague is upheld. This indicates the importance of the issue from the Information Commissioner's perspective.

71. It is common ground that the issue is one of statutory construction, turning on the meaning and effect of section 2(2)(b) of FOIA, read in context.

72. The applicable principles of statutory construction are not in doubt and have been authoritatively stated in judgments of this Court, including in particular the judgment of Lord Hodge in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255. He emphasised the primacy of the words of the statute, read in context, at para 29:

> "Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained."

73. Lord Hodge considered the relevance of external aids to construction at para 30:

> "External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

74. It is commonly the case that the correct meaning of a statute is informed by a consideration of secondary sources of the type discussed by Lord Hodge at para 30. The purpose of a provision in a statute and the policy of Parliament in enacting it may credibly appear from such sources. This in turn will influence the interpretation of the relevant provision.

75. This appeal is relatively unusual in that the parties have not found any external aids which shed light on the issue for decision. FOIA was novel legislation, so it has no prior statutory or common law context. Nor did any report, or the Government White Paper, Your Right to Know, which preceded the Act, touch on the issue, and the issue was not the subject of any Ministerial statement in Parliament.

76. There is therefore no support to be found outside the terms of FOIA for concluding that the purpose of Parliament was either to permit or to preclude the aggregation of public interest factors arising under separate qualified exemptions. This is important because it was the principal theme of the oral submissions of Sir James Eadie KC on behalf the Department to ask: why would Parliament not want to permit aggregation of public interest factors against disclosure?

77. The same approach was taken by Lewis LJ in his judgment in the Court of Appeal. At para 37, he said that:

> "As [section 2(2)(b)] is concerned with the public interest in maintaining the exemption of the information from disclosure, *the natural inference* is that it permits the decision-maker to weigh the combined, or aggregated, public interest reflected in the different applicable provisions of Part II. *There is no reason why the public interest underlying each one of the provisions conferring non-absolute exemption should be considered separately in deciding whether the public interest in maintaining the exemption of the information from disclosure outweighs the public interest in disclosure. Rather, the natural inference is that Parliament would have expected all the relevant aspects of the public interest recognised in the applicable provisions of Part II to be considered* when deciding whether the public interest in maintaining the exemption of the information from disclosure outweighed the public interest in disclosure. *On a proper interpretation, therefore*, section 2(2)(b) of FOIA permits the public interest recognised in two or more different provisions in Part II to be assessed in combination or aggregated in determining whether the public interest in maintaining the exemption of the information from disclosure outweighs the public interest in disclosure." (emphasis added)

78. As can be seen from the emphasised parts of that passage, Lewis LJ proceeded by way of a "natural inference" – or assumption – that Parliament would wish the public interest factors under separate exemptions to be aggregated. There was "no reason why the public interest underlying each one of the provisions conferring non-absolute

exemption should be considered separately". "On a proper interpretation, therefore", section 2(2)(b) permits the aggregation of the separate public interest factors.

79. The difficulty with this approach is that there is no basis for any "natural inference" which can provide a basis for arriving at the correct construction. As is common ground, there is no external aid. Equally, and importantly, it was not suggested that a policy of either permitting or precluding aggregation was somehow improbable, still less absurd. FOIA creates a complex system of separate categories of public interest, both absolute and qualified, by which the issue of whether to withhold disclosure is to be decided. The focus of Part II of FOIA is on individual categories of exemption. It does not deal with that issue by a single public interest test, unlike (for example) section 11A(5) of Australia's Freedom of Information Act 1982. It is entirely plausible that Parliament's purpose was to require the balance of public interests to be struck by reference to the factors relevant to each exemption relied on by the public authority. If the public interest in non-disclosure was insufficient to overcome the public interest in disclosure in the case of each exemption, there is nothing surprising in a policy that the information should be disclosed. It is not often that two or more failures are said to create a success. That is not to say, however, that Parliament's purpose could not have been to permit or require the aggregation of public interest factors across the exemptions relied on.

80. A point emphasised by Sir James Eadie was that the independent approach, as opposed to aggregation, led to an imbalance between the competing public interests in disclosure and non-disclosure. He characterised the public interest in disclosure as a single, and powerful, public interest which applied equally across all the qualified exemptions, whereas the qualified exemptions raised a disparate range of public interest factors which would be likely to differ as between the different exemptions. It followed, he submitted, that without aggregation the single public interest in disclosure would be met by only a selection of the public interest factors favouring non-disclosure, whereas Parliament is likely to have intended that the single public interest in favour of disclosure should be balanced against all the relevant public interest factors against disclosure arising from all the applicable exemptions taken together.

81. Like the "natural inference" on which Lewis LJ relied, this too is based on a presumption as to the policy that Parliament would have been likely to adopt. Given that Parliament has not adopted the single public interest test against disclosure which appears in the Australian legislation and has adopted a series of different categories of qualified exemptions, there can be no such presumption.

82. Importantly, the assumption that there is a single public interest in disclosure which applies across the board to all qualified exemptions is not borne out by the way in which the balance is struck in relation to each exemption. This is clearly illustrated by the detailed assessment in this case made by both the Information Commissioner and the FTT of the factors in favour of disclosure which were specific to the exemptions under sections

27 and 35. It was principally by reference to those factors, rather than broad principles of open government that their decisions were made. In paras 102-105 of its Decision, the FTT identified factors specific to international trade talks which were relied on by Mr Montague and which were accepted by the FTT, leading it to conclude at para 106: "The considerations at paras 102-105 would certainly indicate that there was a weighty public interest in disclosure of information about trade talks in general terms and we note that the [Department] accepted as much…". So, for example, the withheld material related to "the all-important issue of the UK's future trading arrangement with the rest of the world following Brexit" and there were "legitimate issues as to what those arrangements should be" (para 102). The terms of trade deals raise "very legitimate concerns in many controversial areas, including the environment, labour protection, food safety and the health service" (para 103). There was "substantial evidence that openness improves the negotiating position and the quality of trade agreements" (para 105). As these paragraphs show, the assessment of the competing public interests involves a detailed examination of the factors favouring disclosure, as well as those favouring non-disclosure, and not simply a single broad-brush approach.

83. The issue can therefore only be decided by reference to the terms of section 2(2)(b) and related provisions in FOIA, without any preconception as to which is the more likely construction.

84. The principal statutory provision in play here is section 2 of FOIA which we set out in part for convenience:

> "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."

85. Section 2(1) of FOIA deals with the duty to confirm or deny. The opening words engage "any provision of Part II" in which the duty to confirm or deny is stated "not [to] arise". It then provides for the effect of "the provision" (not underlined in FOIA). This wording indicates that each provision which is engaged is separately assessed in terms of its effect. That assessment governs both section 2(1)(a) and section 2(1)(b). The term "the provision" is repeated in section 2(1)(a). This is a reference to a single provision which automatically confers absolute exemption. There is no reason to interpret "the provision" to have a meaning in the governing part of section 2(1) which is different from that in section 2(1)(a). Accordingly, the test in section 2(1)(b) is similarly concerned with a single provision of Part II. Unless there is some basis for having different meanings for the words "the provision" in section 2, section 2(1) does not support aggregation in either limb.

86. Section 2(2) deals with the disclosure of information. It concerns "information which is exempt information by virtue of any provision of Part II". Section 2(2)(a) is concerned with information which is exempt information by virtue of a provision conferring absolute exemption. That again focuses on individual exemptions.

87. Section 2(2)(b) provides that the duty to disclose does not apply if or to the extent that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The meaning of "maintaining the exemption" must be found by looking at the governing words of the subsection so must refer to maintaining the exemption of any information which is exempt information by virtue of any provision of Part II.

88. Although it could be argued that "any provision" in section 2(2) could refer to more than one provision, that would require some basis for treating the test for disclosure of the existence of information differently from that for disclosure of the information. As the provisions of sections 27 and 35 show, the factors relating to the treatment of the acknowledgement of existence and communication of content are the same in many of the provisions of Part II and there is no basis for taking a different approach in section 2(2)(b) from that in section 2(1)(b). In any event the term "any provision" can comfortably refer to a single provision as a matter of statutory interpretation.

89. The Department placed some emphasis on the words "in all the circumstances of the case" in section 2(2)(b). In our view this is at most a neutral point. The information relevant to the public interests in Part II can be of a variable kind particularly where a class-based exemption is in play. The reference to all the circumstances of the case is apt to capture the need for careful consideration of the public interests at play in such circumstances. It certainly could not justify a free-standing public interest basis for exemption not otherwise appearing in the Act.

90. Although the Court of Appeal set out the terms of section 2, there was no examination of section 2(1) which was not addressed at all in the judgment of Lewis LJ and only briefly mentioned in the concurring judgment of Andrews LJ. That is because the court considered the key issue was the interpretation of section 2(2)(b) in isolation. However, that subsection needed to be read in the context of the statute as a whole.

91. The Information Commissioner submitted that, by reason of the Court of Appeal's failure to appreciate the need to examine all the terms of the Act in order to resolve the issue as to how the exemption of information from disclosure should be assessed, it fell into error by selecting one policy choice without consideration of the relevant statutory provisions.

92. The use of the terms "maintaining the exclusion of the duty" in section 2(1)(b) and "maintaining the exemption" in section 2(2)(b) also support the Information Commissioner's submission. Maintenance inevitably refers back to the source of the exemption or duty. That can only derive from the individual section in Part II creating the exemption or duty and defining the public interest purpose for which it was intended. That informs the interpretation of "maintaining the exemption".

93. Section 17 of FOIA also needs to be considered. It is headed "Refusal of request" and provides in section 17(1):

> "(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
>
> (a) states that fact,
>
> (b) specifies the exemption in question, and

> (c) states (if that would not otherwise be apparent) why the exemption applies."

94. The purpose of section 17 is to provide transparency and accountability in the application of the Act. The notice required by section 17(1) when dealing with a qualified exemption must state that the information is exempt information, must do that in relation to the exemption in question and must state why that exemption applies. The reference to exemption in section 17(1)(b) must be the same as the reference to exemption in section 17(1)(c). In each case that is a single exemption and there is no place for aggregation, although there may be any number of references to sections which have been engaged by the particular information.

95. Section 17(3) provides further requirements in respect of notification:

> "(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—
>
> (a) that, 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 authority holds the information, or
>
> (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

96. The meaning of the word "exemption" in section 17(1)(b) and (c) must be the same as in section 17(3)(b) unless there is some requirement to treat these words in the same section as having different meanings, a point emphasised by the fact that section 17(3) specifically refers back to the notice which the public authority must give to the applicant and which must specify the exemption in question. In the case of multiple exemptions each must be addressed individually.

97. It is not without significance that the purpose of section 17 would be somewhat undermined by an approach based on aggregation. The greater the number of discretionary variables available to the public authority in the determination of the public interest in maintaining the exemption of the information from disclosure, the more

difficult it will be to hold the decision maker to account and the less transparent the process will become.

98. There is also a real risk that on the cumulative approach the decision maker will be free to take a broad view of the need to disclose rather than carefully weighing in each case the weight that can properly be placed on the individual items and then assessing how, if at all, the multiple interests affect the overall balance. That the purpose of the statute is that all this should be read in without any indication as to how this should be approached is highly unlikely.

99. There are three further issues which can be addressed briefly.

100. First, both the UT and the Court of Appeal rejected the submission that the interpretation of similar words in regulation 12 of the Environmental Information Regulations 2004 which permitted aggregation were material: see *R (Office of Communications) v Information Comr* [2010] UKSC 3, [2010] Env LR 20. Those Regulations post-dated the Act and the interpretation was determined by reference to Parliament and Council Directive 2003/4/EC on public access to environmental information on which they were based. As well as the different context, there are material differences in the language of article 4 of the Directive as compared with section 2(2)(b), as the UT observed. It is of some interest that the case was referred to the ECJ because there was a difference of view in the Supreme Court on whether aggregation applied. Sir James Eadie placed no reliance on those Regulations before this Court and, in our view, he was right not to do so. The Regulations provide no basis for aggregation in FOIA.

101. Secondly, it was submitted that section 6(c) of the Interpretation Act 1978 which provides that words in the singular include the plural unless the contrary intention appears applies in this instance to make exemption in section 2(2)(b) mean exemptions. For the reasons given, the wording of section 2(1) is focussed on "the provision" and to interpret exemption in the plural in section 2(2)(b) would lead to different tests for disclosing the existence of information and its disclosure. That outcome is not consistent with the scheme of the Act.

102. Finally, the Information Commissioner submitted that aggregation would cause real practical difficulties for public authorities and the Commissioner in applying the provisions of FOIA. That was indeed one of the reasons why he sought permission to appeal. Given the immense experience of the Commissioner and his office in the application of FOIA, this assessment deserves respect. A court is not well-placed to substitute its own view. Sir James Eadie did not dismiss this concern. He accepted that there were some public interest factors against disclosure which would be very difficult to combine but submitted that in other cases there would be little difficulty. He suggested that aggregation should occur in those cases where it could be done but not in the others.

In our view, this tells against an interpretation which, without clear words, would permit or require aggregation on a piecemeal basis.

103. For the reasons given in this judgment, we would allow the appeal.