



**FIRST – TIER TRIBUNAL**

**GENERAL REGULATORY CHAMBER**

**Information Rights**

**Appeal Number: EA/2012/0245**

**Appellant: Adam Roberts**

**Respondent: The Information Commissioner**

**Second Respondent The Cabinet Office**

**Before:**

**Brian Kennedy QC (Tribunal Judge)**

**Steve Shaw (Tribunal Member)**

**Malcolm Clarke (Tribunal Member)**

**Hearing: Fleetbank House, London on 17 September 2013.**

**Appearances:**

**The Appellant**

**Tom Cross of counsel for the Respondent**

**Holly Stout of counsel for the Second Respondent**

**Subject matter:** Freedom of Information Act 2000, and the engagement of the exemption under Section 36(2) and the application of the public interest test.

## **DECISION**

The Tribunal upholds the decision notice dated 22 October 2012 and dismisses the appeal.

## **REASONS**

### **Introduction:**

1. The Appellant wrote to the Second Respondent (“the Cabinet Office”) on the 13<sup>th</sup> June 2011 and requested the following information under section 1 of the Freedom of Information Act 2000 (“FOIA”); *“I am writing to request copies of any and all written correspondence between the Archbishop of Canterbury and the Prime Minister/his office between the dates of 11/05/2010 and 13/06/2011.”*
2. This “requested information” was correspondence between the Archbishop of Canterbury (“the Archbishop”) and the Prime Minister (“the PM”) between the day when David Cameron became PM and the date of the request.
3. The Cabinet Office responded on the 11<sup>th</sup> July 2011 confirming that it holds information within the scope of the request and ultimately on the 15<sup>th</sup> September 2011 informed the Appellant that it was withholding the requested information under the exemption in section 36(2)(b)(ii) of FOIA.
4. Following an internal review the Cabinet Office wrote to the Appellant on the 21<sup>st</sup> February 2012 upholding that decision in relation to most of the requested information but provided the Appellant with one item of correspondence which it no longer regarded as exempt.

5. The Appellant contacted the Respondent (“the Commissioner”) and brings this appeal against a Decision Notice, Ref. No: FS50432797, (“DN”) issued by the Commissioner on the 22 October 2012 upholding the refusal by the Cabinet Office to disclose the requested information.

**Statutory Framework:**

- Under section 1(1) of FOIA: “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”.
- Section 36 of FOIA is contained in Part II (exempt information). It applies to information held by the Cabinet Office and Section 36(2)(b) provides that: (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act (b) would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation -----”

**The Issues for the Tribunal:**

6. The Parties agree that the Section 36 exemption is engaged and that the Minister for the Cabinet Office, the qualified person in this case, would have understood their role and responsibilities with respect to FOIA and that it was reasonable in this case to reach the opinion that the exemption was engaged. Accordingly the arguments in relation to the opinion carry through to the public interest test. For the avoidance of doubt the Tribunal find that Section 36 is engaged for the reasons accepted by the parties and that the public interest test is the principal issue in this case.

**Subsequent events:**

7. During the course of Mr. Roberts’ appeal to the Tribunal, the Cabinet Office has located additional information falling within scope which it had not provided to the Commissioner. It is withholding four categories of information (A\_D) as detailed at Paragraph 47 of the witness statement of Sir Paul Britton including:

- a) Extracts from an additional 15 letters, 12 of which have been disclosed containing information about senior clerical appointments [Open Bundle 97 – 108]. The Cabinet Office seeks to withhold in their entirety the three other letters of the additional 15 located, relying on Section 36(2)(b)(i) and (ii) and in the alternative exemption under Section 40(2) (that is, that the information within them contains personal data disclosure of which would breach the first data protection principle): [see correspondence at Open Bundle /108A].
  - b) With respect to other correspondence the Cabinet Office relies, again, on Sections 36(2)(b)(ii) and/or Section 41 (Information provided in confidence, which although an absolute exemption public interest considerations are still relevant to the application of the exemption and further on Section 40(2)
  - c) The Cabinet also raise Section 27, in so far as relevant. International relations: Section 27(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 – or (c) the interests of the United Kingdom abroad ---. Section 27(1) is a qualified exemption subject to the public interest test in S2(2)(b).
8. The disputed information, and the differing bases on which the Cabinet Office seek to withhold it, is explained (in closed evidence) at paragraphs 47 and 48 of the witness statement of Sir Paul Britton. All of this further material referred to in Paragraph 7 is post the DN, the subject matter of this appeal, nevertheless it is within the scope of the request and is referred to further in Paragraphs 21 to 26 below.

**The Decision Notice:**

9. The DN is a matter of public record and we will not rehearse the detail herein but the scope of the case was identified from the Appellant’s complaint to the Commissioner thus: “*Firstly, the request would not severely, frequently or to a great extent inhibit the quality of exchanges between the Archbishop and the Prime Minister or his office. Secondly there is a strong and pressing public interest case for the information being released.*” The main issue clearly is about the application of the Public Interest test.

10. The Appellant had also queries about the way in which the information provided was disclosed to him and the Commissioner has acknowledged that and dealt with it. It does not form part of this appeal.

11. The Commissioner in addressing the Public Interest test considered the following arguments in favour of disclosing the requested information:

- The Commissioner considered that the Cabinet Office recognised that there is a general public interest in knowledge of whom the PM corresponds with. The Cabinet Office acknowledges that disclosure could allow more informed debate.
- The Commissioner considered the points made by the Appellant on the status of the Archbishop inter-alia (a) Identifying the Archbishop: *“an Archbishop politically prepared to question government”* (b) Identifying the Archbishop as the senior bishop and principal leader of the Church of England of which the Appellant stated: *“In no other organisation is there a comparable interest in understanding how it puts pressure on Government”*.
- The Commissioner considered the Appellant’s argument doubt that disclosure would have the detrimental effect described by the Cabinet Office, as put by the Appellant thus: *“It is incredibly unlikely the Archbishop will cease providing advice and pressure of comparable quality and use to government, and, moreover, the nature of the Archbishop’s faith and role make it ever less probable that disclosure would obstruct exchanges in future.”*

12. The Commissioner in addressing the Public Interest test then considered the following arguments in favour of maintaining the exemption.

- The Cabinet Office informed the Commissioner that the PM and the Archbishop required to be able to have a confidential dialogue about areas of mutual concern, including issues which are sensitive in nature.
- The Cabinet Office went on to argue that disclosure in this case: *“would undermine the quality and nature of this dialogue in the future”*.
- Further the Cabinet Office argued strongly that: *“erosion of safe space to exchange views could lead to an absence of debate between important stakeholders and Government Ministers which would be to the serious detriment of the conduct of public affairs”*.

13. In the exercise of the balance of the above arguments the Commissioner took into account the likelihood of disclosure restraining, decreasing or suppressing the freedom with which views are exchanged. In doing so the Commissioner

considered the content and sensitivity of the withheld information and the timing of the request as well as the arguments made by the parties. He considered the following important points:

- The request necessarily relates to a time when the PM was newly in his post.
- The Commissioner accepted a suspicion of wrongdoing adds weight in favour of disclosure but was satisfied that there was none in this case.
- The Commissioner accepted the merit in the argument that disclosure would provide greater transparency, in this case by demonstrating the topics of exchange.
- The Commissioner accepted there is a strong public interest in the PM and any religious leader, in this case the Archbishop, being able to exchange views without fear of disclosure. He considered there is a strong need for information to be shared in a free and frank way to enable the parties to express their candid opinion in relation to matters of mutual interest, including those of a sensitive nature.
- The Commissioner having accepted the qualified person's opinion that the free and frank provision of views would be inhibited as a result of disclosure, recognised that the impact of this inhibition could be severe given the importance of the relationship between the PM and the Archbishop and the importance of their respective positions. The Commissioner considered and recognised the expectation of trust and confidentiality on which dialogue within such a relationship is based.

14. Taking all the circumstances of this case into account, the Commissioner considered the desirability for openness and transparency through disclosing the withheld information does not equal or outweigh the harm that disclosure would cause.

#### **The Appeal:**

15. The Appellant argues that disclosure of the requested information would not sharply inhibit the freedom of the interactions of the Archbishop and the Prime Minister because it is part of the Archbishop's role and duty to represent Christians to secular authorities. The Commissioner recognises that the Archbishop does have such a representative role to at least some extent but argues that the Appellant fails to provide any evidence to support his assertion that there would not be severe inhibition arising from the disclosure of the withheld information. This, the Commissioner maintains, results in the Appellant's failure to establish any error in the Commissioner's decision in this regard.

16. The Appellant argues that the public interest factors in favour of disclosure are exceptionally strong. He argues the Archbishop occupies a constitutional position in Britain, as senior primate of the established Church, which surely justifies a

heightened degree of scrutiny. The Commissioner noted at Para 33 of the DN that there was no evidence that the views being expressed could be considered to be favouring the Church of England or guiding policy. The Commissioner stresses that what the public interest test under FOIA involves is consideration of public interest factors and while Anglican Christians are members of the public that does not mean that their interests should be determinative. Nor, argues the Commissioner, does it follow that under FOIA there is strong public interest in knowing the Church's standpoints.

17. The Appellant goes on to argue that there is a strong public interest favouring disclosure which arises as a result of the status of the Archbishop, the secular concerns of the Church of England, and the relevance of Christian doctrine to contemporary public debates and public formation.
18. Because it would defeat the purpose of any effective exemption, the Appellant cannot view the closed material or hear the closed evidence at the appeal. The Commissioner and this Tribunal therefore have an advantage over the Appellant in considering and understanding the content of the withheld information and this has a significant bearing on their ability to assess the merits or otherwise of disclosure of the withheld information.

### **The Evidence:**

19. The principal witness at the hearing was Sir Paul Britton, the Prime Minister's Appointments Secretary (see statement of evidence at Open Bundle pages 109 – 135) who gave evidence at the open part of the hearing and further at the closed part of the hearing where the Appellant was not in attendance. This witness was cross examined comprehensively and thoroughly by the Appellant at the Open session. At the conclusion of the evidence and on deliberation thereafter, the Tribunal concluded, on balance, that the public interest is in favour of non-disclosure of the withheld information and that the Commissioner was correct in his DN for the reasons he gave therein.

### **Conclusion:**

20. Having heard all the evidence and considered all the papers on the facts pertaining to the withheld information in this particular case, the Tribunal are unanimous in their view that on balance, the public interest is in favour of non disclosure of the withheld information. In that regard we make the following further observations:

- a) We are of the view that the public interest arguments on both sides of the argument are relatively weak in this case.
- b) On the Cabinet Office side there is a public interest in protecting the “safe space” for dialogue between the PM and the Archbishop within the areas on which the Archbishop has a unique constitutional role, which we feel would be threatened if it was felt that there is a risk of items being disclosed within a short space of time, even where disclosure would be of documents which do not relate to the Archbishop’s constitutional role.
- c) We are of the view that there is no significant public interest in preserving a safe space for the Archbishop on other matters on which he chooses to comment, over and above that which might apply to many other campaigning/lobbying groups who have a view.
- d) Specifically, the fact that there are wide divisions of opinion within the church, whilst true (and agreed by the parties), is not as suggested by the Cabinet Office, a compelling reason for protecting the space. This is a reality in many campaigning or lobby groups.
- e) We are of the view that the fact that the request was for correspondence very early in the relationship is a significant factor in the argument in favour of maintaining the exemption because there is a public interest in the PM being able to develop that relationship in order to have confidence that the Archbishop would not feel inhibited in his correspondence.
- f) We note that some correspondence has already been released by the Cabinet Office.
- g) We note from the correspondence the Archbishop expected it to remain confidential and the evidence of Sir Paul was that the Archbishop had not consented to its release. We add, had there been (which there wasn’t) evidence of the Archbishop saying things in private which were not consistent with what he was saying in public, that would have significantly influenced our judgment on the public interest test.

**21.** Having looked at the withheld information we are satisfied that the additional material discovered in the subsequent events referred to at paragraph 7 above is of the same genre as the original withheld information. Where covered by the section 36 exemptions it is subject to the public interest, which for the reasons stated above, lies in non disclosure.



**22.** The CO also hold information under Section 40(2) (personal data) in the form of extracts from letters related to senior Church appointments as identified at Category A in paragraph 8 of their Open Skeleton argument of 12 September 2013. The Appellant concedes at paragraph 1 of his Skeleton argument dated 2 September 2013: *“There would never have been any dispute over this correspondence: It should not be disclosed.”* Accordingly there is no dispute in relation to this correspondence.

**23.** In so far as there is a dispute as to whether the documents in Category C as referred to at paragraph 8 of the Open Skeleton argument of the CO dated 12 September 2013 and described at paragraph 47 of Sir Paul Britton’s witness statement, the CO claim exemption under Section 40(2).

**24.** Section 40(2) is an absolute exemption. Section 40 provides, so far as relevant:

40. – Personal information.

(1) Any information to which a request for information relates is also exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if -

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is –

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise under this Act would contravene –

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

**25.** By s 1(1) of the Data protection Act 1998 (“DPA”), personal data means “*data which relate to a living individual who can be identified: (a) from those data, or (b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual*”.

**26.** Having considered all the evidence and the relevant documents in this case the Tribunal are satisfied the disputed information referred to at paragraph 23 above, that is letters written by the Archbishop and the PM, constitute personal data which contain personal data “about” the individuals in question and in all the circumstances of this case, as considered above in this judgment, disclosure would contravene the first data protection principle. Accordingly we find Section 40(2) applies to the documents referred to in Category C which are therefore exempt.

**27.** The Tribunal wish to acknowledge the exemplary manner in which the parties and their counsel presented their case to us. In particular we wish to compliment the Appellant, who as a personal litigant was most straightforward and frank in his genuine and conscientious presentation of an important debate on the accountability and transparency of public affairs.

Brian Kennedy QC

25 October 2013.