IN THE FIRST-TIER TRIBUNAL **Case No. EA/2013/0119**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50474524
Dated: 13 May 2013

Appellant: THE CABINET OFFICE

Respondent: THE INFORMATION COMMISSIONER

Heard at: Field House, 15 Bream's Buildings, London EC4A

Date of hearing: 22nd October 2013

Date of decision: 27th November 2013

Before
CHRIS RYAN
(Judge)
and
DARRYL STEPHENSON
ANDREW WHETNALL

Attendances:

For the Appellant: Rachel Kamm
For the Respondent: Robin Hopkins

Subject matter:
Formulation or development of government policy s.35(1)(a)
Ministerial Communications s.35(1)(b)
Public interest test s.2

Cases:
OGC v Information Commissioner [2008] EWHC 774 (Admin).
The Department for Education and Skills v Information Commissioner and the Evening Standard, Appeal No EA/2006/0006.

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2013/0119**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is refused.

REASONS FOR DECISION

Summary

1. We have decided that the Cabinet Office was not entitled to refuse to disclose the number of times that a particular Cabinet sub-committee had met, relying upon the exemption from disclosure applying to information relating to the formulation or development of government policy. The exemption was engaged but the public interest in maintaining it did not outweigh the public interest in disclosure.

Background

2. In May 2010 the current coalition government published a document entitled "The Coalition: our programme for government". It included detail of a programme to cut unnecessary red tape in the rules and regulations affecting members of the public. In the same month the government established a sub-committee of the Cabinet, the Reducing Regulation Committee ("RRC"), to maintain oversight of its objective of improving the regulatory framework by scrutinising, challenging and approving all new regulatory proposals. The RRC is chaired by the Secretary of State for Business Innovation and Skills and its membership includes a number of senior ministers.

3. The RRC operates at the top end of a process designed to create a culture of lighter touch regulation replacing the traditional "command and control" approach. Its work includes:
    a. Supervising the government's "one-in-two-out" rule for domestic regulation (under which government departments may not propose new primary or secondary

legislation without identifying for repeal existing regulations having an equivalent cost for business or civil society organisations).

b. Receiving proposals for regulatory reform from government departments in response to input from the public provided through the "Red Tape Challenge", a web-based crowd-sourcing programme.

c. Considering opinions proffered by the Regulatory Policy Committee ("RPC"). This is an external body manned by independent individuals with expertise in business, employee and consumer issues. It provides independent scrutiny of all proposed regulations and prepares an opinion for the RRC on the impact assessment provided by the department sponsoring each such proposal.

The Request for Information

4. On 21 August 2012 Ms Nicola Beckford asked the Cabinet Office how many times the RRC had met since it had been established.

5. FOIA section 1 imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

> *"in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"*

6. Although the Cabinet Office conceded that it held the requested information it refused to provide it because, it said, it fell within the exemptions provided by FOIA section 35(1)(a) and (b), which reads:

> *"(1) Information held by a government department … is exempt information if it relates to—*
>
> *(a) the formulation or development of government policy,*
>
> *(b) Ministerial communications"*

7. FOIA section 35 creates a qualified exemption.

8. The Cabinet Office's refusal was upheld on internal review but, following a complaint by Ms Beckford the Information Commissioner issued a Decision Notice on 13 May 2013 ("the Decision Notice"), in which he concluded that, although the exemption was engaged, the balance of the public interest favoured disclosure.

9. The Information Commissioner considered the content of the withheld information and carried out the necessary balancing exercise in the context of what its public disclosure might demonstrate. He noted the fact that the existence and activities of the RRC had been publicised on certain websites published by the government. This included, in particular, extensive publicising of its establishment in 2010. He noted, too, that the public had been invited to participate in the process of regulatory simplification through the Red Tape Challenge. He concluded that there was therefore already a body of information about the RRC in the public domain and quoted a passage from the Red Tape Challenge which, in his view, indicated an acceptance by the government of the public as active shareholders in the initiative to reduce regulation. The passage read:

> *"The Commissioner therefore considers that there is already information about the RRC in the public domain and that the puplic are, to a certain extent, invited to engage with its work. The Cabinet Office's own website states of the Red Tape Challenge:*
>
> > *'This interactive campaign signifies a dramatic shift in the culture of Whitehall, as we work together collaboratively to turn the regulatory default on its head'"*

10. Although the Information Commissioner accepted, in broad terms, the need to preserve private thinking space for those developing policy and to encourage free and frank discussion, he did not accept that releasing the number of times the RRC had met would lead to Ministers becoming more circumspect and less effective in the way they approached their work. The Information Commissioner expressly rejected the following three arguments put forward by the Cabinet Office:

    a. The public would misinterpret the withheld information and acquire a misleading impression of the amount of work being done by the RRC. Disclosure, the Information Commissioner said, always presents public authorities with an

opportunity to provide context and it was open to the Cabinet Office in this case to provide an explanation in order to prevent any misunderstanding.

b. Ministers might become less willing to address policy matters in detailed correspondence, preferring to do so only during RRC meetings. They might feel that, although less conducive to a thorough and detailed dialogue, this would enable them to record the fact that meetings had in fact taken place. The Information Commissioner considered that the public had a right to expect Ministers to be more robust in determining the best way of working, regardless of public perception.

c. Disclosure would damage collective Cabinet responsibility. However, as the requested information related to the number of meetings, and not the views of any individual Minister expressed during them, the Information Commissioner did not accept that an argument on this basis could be sustained.

The Appeal

11. On 10 June 2013 the Cabinet Office filed an appeal with this Tribunal, asserting that the ICO had erred in his conclusion that the public interest in maintaining the exemption relied on did not outweigh the public interest in disclosure.

12. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Frequently, as in this case, we find ourselves making our decision on the basis of evidence that is more extensive than that submitted to the Information Commissioner.

13. The Information Commissioner, as respondent to the appeal, accepted, as he had done in the Decision Notice, that the relevant exemption was engaged with the result that the public interest balance is the only issued we are required to determine.

14. The appeal was heard on 22 October 2013 with Rachel Kamm representing the Cabinet Office and Robin Hopkins representing the Information Commissioner. We are grateful to both advocates for their clear and balanced submissions.

15. At the start of the hearing we asked the parties to disclose to us, in closed session, the withheld information i.e. the number of RRC meetings that had taken place between the date of its establishment and August 2012, when the information request was submitted.

Evidence on the Appeal

16. The Cabinet Office files a witness statement made by Dr Geoffrey Baldwin, the Deputy Director in the Economic and Domestic Affairs Secretariat and Head of Growth and Economic Affairs. Dr Baldwin attended the hearing and provided clear and helpful answers to a number of questions we put to him.

17. Dr Baldwin explained the role of the RRC, as summarised above. He mentioned an additional element of the simplification initiatives, being the six monthly publication by the Department for Business, Innovation and Skills ("BIS") of a "Statement of New Regulation", which set out the regulations due to come into force in the immediate future and reported on the progress of the "one-in-two-out" rule on a department by department basis. His evidence was that the RPC had issued 579 opinions in 2011 and 654 in 2012, all of which had been published on the RPC website. He suggested that, against a background of transparency and engagement with the public, the number of times the RRC had met would not reveal anything significant and might well be misleading about the Government's priorities on reducing regulation and/or ministerial engagement with the process. Dr Baldwin explained that Ministers and their advisers engaged with policy issues in many different ways, including correspondence and informal discussions, so that the number of formal meetings provided a potentially misleading impression of their commitment to reducing regulation.

18. Dr Baldwin feared that disclosure of the requested information would cause Ministers to focus on procedural issues, rather than the policy outcome. His context was the twin constitutional principles of, first, ministerial accountability to Parliament for decision making and, secondly, the requirement for members of the government to support official policy, once adopted, even if the individual had argued against it during its development. The consequence, he said, was that Ministers needed to have confidence in the method and process adopted for policy development and in the secrecy of debate on the topic. Maintaining the confidence necessitated keeping secret both the detailed discussions and the timing and frequency of those discussions.

19. A further concern of Dr Baldwin was that, although the requested information might appear anodyne, its disclosure would cause the public to base its interpretation of ministers' commitment to reducing regulation on the number of RRC meetings

and to ignore the other elements of the decision-making process. This misleading impression would run counter to both the spirit and practice of democratic accountability underpinning government in the UK. Disclosure would also undermine ministerial accountability. If a Minister is to be accountable for a decision then he or she needs to have full control over the process for reaching the decisions. It would be counter-productive if informal rules were to be developed as to the number and frequency of meetings as this would undermine flexibility in determining the best way to reach a decision.

The Parties' submissions on the public interest balance

General points

20. Two points of general application arose in the course of argument. The first related to the overall approach to the public interest test. The second was said to be a factor that had relevance to both sides of the balance – the risk of the public drawing an erroneous conclusion from the withheld information, if it were to be disclosed, so that its disclosure would harm the policy-making process without providing any useful information to the public.

21. **General Approach:** The Information Commissioner placed weight on the fact that the exemption relied on is a class-based one. It arises if, as is conceded on this appeal, the information "relates to" policy development or Ministerial communications. Its engagement does not depend on any particular prejudice likely to arise from the disclosure sought. It was argued that the starting point for the public interest balancing test under FOIA section 2(2)(b) was therefore that both sides of the scales are to be treated as empty at the start – there is no question of the mere fact of engagement contributing any inherent weight in favour of maintaining the exemption. If, therefore, a public authority is unable to identify any harmful consequence resulting from disclosure then disclosure should be ordered because, even if there were no public interest in disclosure, the empty pan on the side of the scale in favour of maintaining the exemption would not "outweigh" the equally empty scale on the other side. The Information Commissioner relied in this respect on the judgement of Stanley Brunton J in *OGC v Information Commissioner* [2008] EWHC 774 (Admin) approving the decision of a differently constituted panel of this Tribunal in *The Department for Education and Skills v Information Commissioner and the Evening Standard,* Appeal No EA/2006/0006. The point was not challenged by the Cabinet Office and we believe that it represents the correct approach to adopt.

22. **Public misunderstanding:** The Cabinet Office argued that that there was a real risk of the withheld information being considered to be more significant than it really was and being misinterpreted by journalists and the public as a measure of the government's focus on regulatory simplification and the priority it

attributed to it. The risk was said to undermine any argument in favour of disclosure and to bolster the case for maintaining the exemption. In this respect the Cabinet Office relied on the decision of Upper Tribunal Judge Jacobs in *Foreign and Commonwealth Office v Information Commissioner and Plowden* [2013]UKUT 275 (AAC) in which he found that the First tier Tribunal had fallen into error by, first, considering only one side of the public interest balancing test and, secondly, in failing to take account of the speculation that might result if some elements of the information recorded in a particular letter were to be disclosed and other elements withheld. That is not the case in this appeal, where the withheld information stands on its own as the factual record of one part of the process by which the reducing regulation initiative is being implemented. While we therefore acknowledge the danger of the disclosure of one piece of apparently innocuous information leading to speculation about what other information may exist, we do not think that such a risk arises on the facts of this case, particularly in light of the large amount of information that has been voluntarily put into the public domain already.

23. The Information Commissioner argued, in any event, that the public interest in disclosure was not determined by whether the withheld information would operate as a reliable indicator of the Government's overall prioritisation and commitment – the public interest lay in improving the transparency of the RRC's work. The frequency of its meetings had relevance to public understanding of that element of the implementation of the government's policy on regulatory simplification. As to any potential harm resulting from disclosure, the Information Commissioner argued that any risk of misunderstanding could, in any event, be negated by providing an explanation that put the withheld information into context. The Cabinet Office expressed concern that this could not be done without disclosing additional information which would invade the safe space required for policy making and damage Ministerial collective responsibility. However, the Cabinet Office's own evidence included a detailed organisation chart, forming part of its "Reducing Regulation Made Simple" publication, which demonstrated very clearly where the RRC was positioned in the process for vetting proposed new regulations. It would take very little additional explanation to put the withheld information into the context of the process illustrated by that chart and we do not accept that this may fairly be characterised as a further erosion of policy development safe space or a challenge to collective responsibility.

Public Interest in maintaining the exemptions

24. Consistent with the argument recorded above, the Information Commissioner argued that disclosure posed no possible threat to good government. The Cabinet Office argued (in addition to the risk of misunderstanding considered above) that disclosure would damage the convention of collective decision making and would create a risk of Ministers removing decision-making from

formal Cabinet committee meetings. We deal with each argument in turn.

25. **Collective responsibility:** The parties were in agreement that there is a strong public interest in protecting the convention of collective decision making but the Information Commissioner did not accept the Cabinet Office contentions that the protection would be undermined because, for the reasons put forward by Dr Baldwin, release of the withheld information would disclose details about the processes followed by Ministers in relation to Cabinet sub-committee decision-making. He argued that the integrity and confidentiality of how those who agreed to take responsibility for a particular decision reached it would not be impaired in any way by the disclosure of the number of meetings that took place. We think that is correct. And we do not accept the argument put forward by Ms Kamm, to the effect that disclosure of this information would set a trend, representing a first step on a slippery slope that would lead to the release of increasing quantities of information. The protection against that happening lies in the process for controlling the release of information in response to future FOIA requests, of which this Tribunal's appeal procedure forms a part.

26. **Behaviour change:** The Cabinet Office argued that if Ministers knew that the number of Cabinet sub-committee meetings would be made public, they would fear that the information would be taken out of context and misinterpreted by the public. They might then take steps to avoid that happening by, for example, fixing a set number of meetings each year and arranging for issues arising between meetings to be decided more informally, thereby removing the process from the established Cabinet structure of minuted meetings. This might preserve "safe space" for Ministers to make decisions but would undermine the concept of responsibility for decision making. The Information Commissioner accepted the broad concept of Ministers having such safe space for decision making but did not think that the disclosure of information about the procedure set up for decision making would impose on it, particularly as Ministers' freedom to set their own procedures have already been severely limited by the release into the public domain of a great deal of information about how the reducing regulation process operated. On this point we agree with the Information Commissioner – we do not accept that Ministers will, or should, adjust the processes by which they make decisions in order to manipulate the freedom of information processes to avoid openness and transparency.

27. It follows from what we have said that we regard the Cabinet Office's case on the harm likely to result from disclosure to be weak and incapable of carrying significant weight in the public interest balancing test.

Public interest in disclosure

28. The Cabinet Office acknowledged that there was a public interest in improving public understanding of the development of government policy and the way Cabinet government operates more generally. However, it argued that disclosure of the withheld information would not contribute materially to public understanding, particularly in the light of the information that had already been made publicly available. The argument depended, to some extent, on the fear that the information would not be understood, which we have already dealt with. If it were properly understood, possibly assisted by being accompanied by an appropriate explanation of its context, it would add to the public information on the decision-making process on this issue. Without the withheld information the process described in "Reducing Regulation Made Simple" might be seen as rather formulaic and theoretical. But when information is provided about the number of meetings, the process may be seen by the public as having practical application. The information may not be as informative in that respect as, for example, the number of opinions submitted to the RRC by the RPC, (which has been put into the public domain) but it does have some value, in our view.

Conclusion

29. In light of our analysis of the factors for and against disclosure, we have concluded that the public interest in maintaining the exemption is so weak that it does not equal, let alone outweigh, the, admittedly light, public interest in disclosure.

30. We therefore conclude that the Cabinet Office should not have refused the original information request, that the Information Commissioner's decision in the Decision Notice was correct and that the appeal should therefore be dismissed.

31. Some of the argument before us, and some of the concerns expressed in his witness statement by Dr Baldwin, seemed to be influenced by a fear that, once the number of meetings had been disclosed, there would be greater pressure to disclose information about the business conducted at those meetings. It is, however, self-evident that any request to have that information disclosed will require to be assessed in its own right under the provisions of FOIA and nothing we have said about the very limited information that was withheld in this case need have any bearing on decisions falling to be made in those very different circumstances.

32. Our decision is unanimous.

Chris Ryan (Judge)
27 November 2013