First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notices FS50699814, FS50703296

Appeal Reference: EA/2018/0120 & 0121

Heard at Venue Fleetbank House
On 2 November 2018

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS
SUZANNE COSGRAVE & JOHN RANDALL

Between

CABINET OFFICE

Appellant 0120

DEPARTMENT FOR DIGITAL CULTURE MEDIA AND SPORT

Appellant 0121

and

INFORMATION COMMISSIONER

Respondent

Appearances: -

Cabinet Office:	**Rory Dunlop**
DCMS:	**Russell Fortt**
Information Commissioner:	**Rupert Paines**

Case:
Chris Ames v Information Commissioner and the Department for Transport EA/2015/0283

DECISION AND REASONS

1. On 3 July 2017 the Respondent in case EA/2018/0121 ("DCMS") issued a press release in the following terms: -

   "DCMS celebrates its 25th anniversary this year, and it is fitting now to include Digital in the name. The department has taken on significant new responsibilities in recent years, so that half of its policy and delivery work now covers the digital sectors – telecommunications, data protecting, internet safety, cyber skills and parts of media and creative industries."

2. Mr Bimmler wrote on the same day to the Respondent in case EA/2018/0120 ("Cabinet Office") and DCMS in similar terms: -

   "I understand that the department has officially changed its name to "Department for Digital, Culture, Media and Sport" as of today.
   I would like to request access to the ministerial submission concerning this decision. I assume that the decision was taken by the Secretary of State, though it may also have been taken by the Prime Minister. If the decision was taken by the Prime Minister, I assume that there was a ministerial submission (or equivalent) concerning a recommendation by the Secretary of State to the Prime Minister concerning this name change. Please provide either.
   Secondly, if there was correspondence with the Cabinet Office concerning this departmental name change, please provide it."

   "I understand that DCMS has officially changed its name to "Department for Digital, Culture, Media and Sport" as of today.
   As the Cabinet Office leads on Machinery of Government changes and cross-departmental coordination, I would assume that the Cabinet Office has been consulted on this departmental name change.
   Please provide the documentation which you hold on this name change (namely any submissions to the Prime Minister, other Cabinet Office ministers or Cabinet Office senior civil servants, any internal file notes and any internal or cross-departmental correspondence).
   A similar request is pending with DCMS, thus please consider Cabinet Office records (incl. Prime Minister's Office records) for this only."

3. In its substantive reply DCMS refused to provide the information relying on the exemption in FOIA section 35(1)(a) which provides: -

   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.

4. DCMS conducted an internal review. It again refused to disclose the information relying on 35(1)(a) and also section 36(2)(b) (i) and (ii).

"36. **Prejudice to effective conduct of public affairs.**
(*1)This section applies to –*
(a)information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and
(b)information which is held by any other public authority.
(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, …"

5. The Cabinet Office also refused to supply the information relying on section 35(1)(a) and (b) and section 42 (legal professional privilege).

6. Mr Bimmler complained to the Respondent Information Commissioner (IC) who investigated both refusals. During the course of the investigation DCMS withdrew reliance on 35(1)(a) and continued to rely on 36(2)(b), on the basis of the qualified opinion of the then Secretary of State that disclosure of the information would be likely to inhibit the free and frank provision of advice and exchange of views. The IC concluded that the opinion was reasonable and the exemption was therefore engaged. In both cases the IC concluded that parts of the information attracted legal professional privilege and that on balance such material should not be disclosed.

7. In weighing the balance of public interest with respect to the remainder of the material the IC concluded that the material should be disclosed.

8. She noted (DCMS decision paragraphs 36-38):-

"some of the exchanges may seem trivial in the context of the more demanding issues officials have to routinely consider. However the seeming triviality of the exchanges is highly unlikely …to result in a severe chilling effect…to affect the meticulousness with which officials conduct policy negotiations

37. Furthermore, the fact that the name change had been agreed and announced prior to the request meant that there was also very little public interest in maintaining a safe space for discussions pursuant to agreeing the change. Such deliberations having concluded by the time the request was submitted.

38. On the other hand, in addition to the public interest in openness, transparency and accountability in government, the Commissioner considers that there is a public interest in understanding how the process evolved including the factors considered relevant to implementing the name change. The withheld information would provide some useful insight in that regard. Whilst this specific public interest might not be particularly significant in the circumstances, the public interest in withholding the withheld information is not stronger, and the public interest in openness and transparency in government should not be underestimated.

9. In similar vein with respect to the Cabinet Office material (decision notice paragraphs 33-34): -

"33. The discussions focus primarily on the rationale for, and the process of, changing the name of DCMS to reflect the way the department's remit has evolved 25 years from when it was established. Parts of the exchanges are candid regarding the proposal itself. However, in the Commissioner's view, disclosure is unlikely to deter officials from expressing their views pursuant to similar and other policy deliberations in an impartial and robust manner. Put simply, disclosure is highly unlikely to affect the meticulousness with which officials carry out their responsibilities. Consequently, she has also attached little weight to the argument for withholding the withheld information in order to prevent a chilling effect on discussions pursuant to the formulation or development of policy.

34. On the other hand, in addition to the public interest in openness and transparency in government, the Commissioner considers that there is a public interest in understanding how the process evolved including the factors considered relevant to implementing the name change. The withheld information would provide some useful insight in that regard. Whilst this specific public interest might not be particularly significant in the circumstances, the public interest in withholding the withheld information is not stronger, and the public interest in openness and transparency in government should not be underestimated."

10. Both Government Departments appealed. DCMS relied on s36(2)(b) and also 35(1), the Cabinet Office relied on 35(1)(a). In support of the appeals Lord Butler (former Cabinet Secretary) and Dame Susan Owen (Permanent Secretary DCMS) gave evidence.

11. In his evidence Lord Butler emphasised the significance of the role of the Cabinet Secretary in supporting policy discussion and decision making between the Prime Minister and other Ministers and the Cabinet Secretary's role in providing full and frank advice in those process. He considered that the disputed material showed that the authors were candid and frank; they were sensitive to the issues and understood the various tensions which needed to be managed and the disruptive effect on the process if the authors needed to second guess who would have access beyond the intended audience. He had consulted his successor (Sir Jeremy Heywood) who shared the view that he and Dame Susan would have been less open and frank if they thought that

their behind the scenes opinions were to be made public. They were aware of FOIA but also aware of the exemptions in FOIA which made provision for free and frank policy discussions. He emphasised the importance of the Cabinet Secretary maintaining positive relations with Ministers *"in his role of a neutral and fair mediator"*. There was a particularly strong public interest in maintaining the confidentiality of the Cabinet Secretary's communications *"in order to allow the holder of that role to be as candid as he feels necessary to offer the Prime Minister honest and effective advice essential to good decision- making"*.

12. He concluded: -

"release of the disputed information would prejudice the role of the Permanent Secretary at DCMS, the Cabinet Secretary and other senior officials, and would also prejudice their successors in those roles. Given the detriment to the effective running of government that even a minor prejudice would have, this would clearly be against the public interest. The consequent damage would, in my view, far outweigh any minor public interest there might be in revealing these exchanges."

13. In oral evidence he confirmed his view that while there were benefits from FOIA there were also some costs. He felt that all advice to Ministers should have a very high level of protection – equivalent to the protection afforded to legal advice. In this case legal advice had been necessary to ensure that the route to changing the name of DCMS would be robust in the face of possible Parliamentary challenge. He confirmed that at a re-shuffle everything has to be done quickly and therefore has to be done through e-mail. At such times people do not have disclosure in mind. In closed evidence questions as to the specific content of the material and the extent of public interest, benefits and harm flowing from disclosure of different parts of the material. He confirmed that during his tenure as Cabinet Secretary e-mail exchanges were not such a feature of the work within Cabinet Office.

14. In her evidence Dame Susan Owen explained the expanding role of DCMS in the area of digital media, data protection, internet security and related fields. There was a benefit in keeping the identity of the Department as DCMS and a need to recognise the increasing importance of Digital within the work of the Department. During the internal review DCMS had considered that withholding the disputed information was justified under both s35 and 36. Officials needed to be able to *"communicate quickly to work out the best solution without worrying their emails would be made public…Releasing the withheld information may make it more likely that advice will be given that is materially different because of the possibility of disclosure."* She understood the basic principle of FOIA that disclosure was required unless an exemption applied. Uncertainty as to whether material was protected from disclosure had changed behaviour. In closed evidence she discussed with the tribunal the issues and sensitivities raised by the disputed material.

15. It was common ground between the parties that, irrespective of whether the material fell within s35(1)(a) or (b) or if not those s36, the issue for the tribunal was where the balance of public interest lay between disclosure and protection of the disputed information.

16. In closing, Counsel for the Cabinet Office emphasised that the generic public interest in openness was situation specific and there was effectively no public interest in large amounts of data held by public authorities; it was necessary in every case to identify why there was an actual benefit. There was no real significance in the change of name; however the name could be seen as significant to the DCMS's stakeholders. While there was no great benefit to the public knowing there could be harm to relations with stakeholders. Further there was real public interest in maintaining the safe space for officials sending quick unguarded e-mails and protecting blue-skies thinking. This interest was all the more important with respect to the Cabinet Secretary in his role and could have a chilling effect on his ability to work effectively.

17. Counsel for DCMS emphasised the importance of the qualified person's opinion that disclosure was likely to inhibit the free and frank provision of advice. As qualified person she was well-placed to make such a judgement and therefore special weight should be given to that. Some weight always attached to the public interest in maintaining a safe space. The public interest in disclosure was weak and the officials had a reasonable belief that anodyne communications would not be disclosed. The reason for the change to digital was fully set out in the press release of 3 July and disclosure of the emails added nothing to that. There was a clear public interest in maintaining the exemptions.

18. Counsel for the IC emphasised the role of FOIA in the promotion of good governance, this public interest was not affected by the possibility that disclosed information could attract wrongheaded criticism. Arguments as to a chilling effect and safe space had most force when a decision had not yet been made, which did not apply to this information. It was appropriate to adopt a sceptical approach to such arguments and he queried whether Nolan compliant people would change behaviour as a result of information disclosure. He argued that the underlying subject matter was of some importance. There was a strong general public interest in how policy develops and there was a particular interest in this process.

Consideration

19. The disputed information consists in essence of emails passing between two Government Departments and e-mails internal to each Department. They cover a brief period of time leading up to the announcement of 3 July 2017. Much of the material is common to both Departments and the issues are also common to the Cabinet Office and DCMS. Counsel for the IC attempted to

convince the tribunal of the general and specific importance of the arguments for openness and transparency. However the tribunal is satisfied that in this case the naming of a Government Department (so long as it is not Orwellian) is not a matter of any substance – "*that which we call a rose by any name would smell as sweet.*" Furthermore the press release set out a transparent justification for the change of name; there is therefore only a modest residual public interest in disclosing the requested information.

20. The tribunal reminded itself that the disputed information consisted of exchanges between very senior public servants who are well aware of their obligations as such. They understand the considerable responsibility they have assumed with their positions to act in accordance with the Nolan principles and the Civil Service Code as they work to secure the good government of the UK. Their primary role in this context is to advise Ministers (including the Prime Minister) and assist in the effective formulation of policy. These are individuals of considerable intellect, rigour and fortitude and it is improbable (to say the least) that they would be prevented from providing the best advice to Ministers by fear that their communications setting out such advice would be released. There is however a significant distinction to be drawn between the substantive advice which shapes policy and the penumbra of other material generated in the rapid exchanges between officials as the policy proposal is passed between departments and starts to assume its final form.

21. Very different considerations arise with respect to these different forms of material. The former, the material with a substantive policy content is the core material for FOIA. It is the answer to the question – "*Why is the government doing this?*" As such it is both worth knowing and likely to engage an exemption, that the disclosure could cause harm. The primary issue in this case is how is the balance between those positions to be struck.

22. It must be borne in mind that the substantive issue was put in the public domain by the departmental press release which also set out the justification for the name change. As the IC has acknowledged the information in the disputed material might not be particularly significant but "*there is a public interest in understanding how the process evolved including the factors relevant to implementing the name change*". The other side of the balance is the potential prejudice caused because information is released which relates to the formulation of Government policy and Ministerial communications.

23. It seems to the tribunal that understanding how public policy was formed in this case is of some (limited) public interest. The fact that the policy formulation was completed and announced before the request was made diminishes the potential for prejudice. The disclosure of the information we have identified as setting out that evolution is, on balance, in the public interest.

24. The second, and much less significant issue, is how the balance of public interest lies with respect to material which falls within the terms of the request for information but does not carry the weight of advancing the policy analysis. While the IC has argued that disclosure would not affect *"the meticulousness with which officials carry out their responsibilities"* that is rather to miss the point.

25. The withheld material is contained in a series of e-mail chains which started shortly after the polls for the General Election closed on 8 June 2017. The largely unforeseen outcome of the election and the uncertainty that resulted as to how a Government would be formed will have added to the work of those at the centre of Government. In addition to these pressures the foreseeable additional workload of the appointment and re-appointment of Ministers, and consideration of changes to the machinery of government, or (as in this case) the naming of a Department of State needed to be carried forward. In such circumstances the need for rapid circulation of information meant that correspondence between officials was by quick, candid and unguarded e-mails. The tribunal is satisfied that aware as they are of FOIA, officials would not have considered that such e-mails would be likely to be disclosed, given the number of exemptions which might be applied to such material (in this case a range of exemptions grouped under 3 different sections have been discussed as relevant to these communications). There was force in the evidence of Lord Butler and Dame Susan Owen that if such communications were perceived as likely to be disclosed there would be some inhibition on sending such e-mails, resulting in greater use of the telephone with all the attendant delays and inefficiencies, as well as a greater risk of error and confusion. In a first-tier tribunal decision on this point (*Ames*) the tribunal very fairly set out the practical difficulties raised by disclosing such information: -

"72. In this particular case we are persuaded that the Department's argument has a modest degree of merit. The disputed information consists of emails evidently written under time pressure and without consideration of how the wording might be read by outsiders, as opposed to colleagues who will respond very quickly with queries, or who will if necessary pick up the telephone or arrange a meeting to iron out ambiguities or misunderstandings resulting from hasty wordings. Despite what might be inferred from the Department's letter of 7 August 2015 to the Information Commissioner in regard to use of the telephone, the present case shows, and the Tribunal is in any event aware, that such emails remain commonplace in Government, as a useful tool for getting Government business done quickly and efficiently. The use of quick emails between colleagues allows a person to send a speedy message as soon as is convenient, with copies to others who need to see it, without needing to laboriously craft the wording, and without needing to find times when relevant participants are free to receive it or to speak and respond on the telephone, while also creating an easily accessible record for officials' use without the need to transcribe or summarise conversations. In our judgment the disclosure of the emails contained in the disputed information in the present case, in response to Mr Ames' request, would have caused embarrassment and difficulty by reason of hasty, ambiguous and unclear wordings,

which would have required resources to be committed to giving public explanations of them, and consequently would also have had a material adverse impact on officials' use of email for similar kinds of urgent Government business in future. In our view greater use of the telephone, and reduced use of quick emails, or the taking of greater time and care over the drafting of emails, would be somewhat less efficient for the conduct of Government business of the kind being transacted in the disputed information. If emails of the kind which we see in this case are too readily disclosed in circumstances where the benefit to the public of seeing the emails is minimal, in our view this will tend to promote greater use of the telephone in future, or else more time to be taken over the drafting of emails, in circumstances where use of quick emails would be more efficient."

26. This tribunal agrees with that thinking. In weighing the public interest in the disclosure of the residue of the material is slight and the prejudice significant. The tribunal is therefore satisfied that this material should not be disclosed.

27. The tribunal therefore allows both appeals in part. The material to be disclosed is set out in the two provisionally Closed Schedules (one with respect to each appeal) to this decision. The two Schedules to remain closed until 35 days have elapsed after the promulgation of this decision or the conclusion of any further appeal with respect to either appeal.

Signed Hughes

Judge of the First-tier Tribunal
Date: 15 November 2018
Promulgation date: 16 November 2018