



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0050

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50768307

Dated: 14 February 2019

Date of Hearing: 11 September 2019

**Before
JUDGE ROBERT GOOD**

**TRIBUNAL MEMBER(S)
MS MARION SAUNDERS AND MR PIETER DE WAAL**

**Between
GEORGE GREENWOOD**

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

MINISTRY OF HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

Second Respondent

Subject Matter:

Freedom of Information Act 2000 (FOIA)

S.36(2) (Conduct of Public Affairs), S.40 (Personal Information)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

REASONS FOR DECISION

Factual background

1. Mr Greenwood was working as an Investigations Producer for the BBC at the time he made the request on 23 February 2018. Following the fire at Grenfell Tower, he requested from the Ministry of Housing, Communities and Local Government (MHCLG) the following information:
 - “Please provide a copy of all communications between Brian Martin and Sajid Javid concerning
 - a. Grenfell
 - b. Fire safety standard for building materials from 13/06/17 to 23/02/18”
2. On 23 March 2018 MHCLG replied stating that it held information within the scope of Mr Greenwood’s request but the information was exempt under S.35 because it related to the formulation of government policy.
3. Mr Greenwood requested a review of this decision arguing that a blanket exemption had been applied and that the public interest in disclosure had not been properly considered. He considered that it was vital that the advice given by Mr Martin is fully accessible to the public to demonstrate openness sought by the relatives and loved ones who died or were injured in the fire.
4. Following an internal review, MHCLG found that the information remained exempt either under S.35 or S.36. MHCLG also apologised for applying S.35 in a blanket manner in its initial response.

5. Mr Greenwood complained to the Information Commissioner (IC) on 18 July 2018 about the refusal to provide the above information. He considered it unlikely that all the requested information would be exempt. In addition, Mr Greenwood stated that there was significant public interest in the government being open about its response to the Grenfell fire. He said “this public interest seems to strongly outweigh any generic concerns about free and frank advice and policy development in this case.”
6. The IC investigated the complaint. Following the start of this investigation, MHLG withdrew its application of s.35 and relied in the main on the exemption set out in S36, with some information exempt under S.40.
7. The IC was given the document at OBp211 and was satisfied that a qualified person has given an opinion, that this opinion is reasonable, and that the exemption in S.36(2) applies to all the withheld information. This is a qualified exemption and the IC went on to consider the public interest test. Her view was that, while there is considerable public interest in disclosure because of the high level of public interest in the Grenfell disaster and that the release of advice given would demonstrate openness and assist in greater public confidence in the inquiry process, there was greater public interest in the ability of officials to be able to provide clear and candid advice which is necessary for good decision making. Disclosure in the view of the IC would likely result in the loss of this ability and that this was not in the public interest.
8. In his grounds of appeal, Mr Greenwood states that MHLG has applied the S36 exemption in a blanket manner and that some of the information at least should be disclosed. In addition, Mr Greenwood argues that public interest is in disclosure so that the advice given by Mr Martin can be publicised “so his actions after the Grenfell disaster can be fully publicly accessible and held to

account." He states that it is important to demonstrate openness to assist those affected to engage in the inquiry process.

9. By Case Management Directions issued on 15/04/2019 MHCLG was made the Second Respondent in this appeal. Further Directions issued on 09/08/2019 allowed MHCLG to make submissions in the alternative on S40 and S42.

The Hearing - Evidence and Submissions

10. Mr Greenwood attended the hearing, representing himself. At the beginning of the hearing he submitted that S36 should not apply to all the withheld information, even if it applied to some of it. The qualified person had approached the exemption in a blanket manner. But that, in any event, there was strong public interest favouring disclosure. There was a need to understand the process of government in the weeks after the disaster. The public interest in knowing what advice Mr Martin was giving and whether this advice was correct outweighs 'safe space' arguments. It is submitted that Mr Martin has an important outward facing role giving advice on technical policy issues. This type of technical advice, because of its nature, would not be affected if it was known that it would be accessible to the public at large.
11. The IC was not represented. However, the IC made both open and closed written submissions, both dated 05/09/2019. Ms Jennifer Thelan of counsel acted for MHCLG. She provided a written skeleton argument on behalf of MHCLG.
12. These submissions argue that, in considering whether the S36 exemption applies, there is first a threshold test, namely whether there is a reasonable opinion of a qualified person that any of the listed prejudices in S36 would or would be likely to occur. Secondly, if that threshold is passed whether or not,

in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing it. It is not for the Tribunal to substitute its view for that of the qualified person, but to consider whether that view was reasonably held.

13. The qualified person in this appeal was the Right Honourable James Brokenshire MP, Secretary of State for Housing, Communities and Local Government. His opinion is at exhibit 7 of Ms Kirwan's statement. He was asked to consider the prejudices set out in S36(b)(i), S36(b)(ii) and S36(c). His view was that these prejudices are all likely to occur if there was disclosure.
14. MHCLG's submission suggests that the reasonableness of the opinion is not an issue in this appeal; it is rather the public interest balancing exercise. Mr Greenwood was unwilling to go this far. However, his submissions about reasonableness of the opinion have been about whether the prejudice exists to all of the information, and in effect, that the qualified person should have looked in more detail at the material and 'graded' the level of prejudice that applied, and had that exercise been undertaken at least some of the information should have been disclosed.
15. Ms Frances Kirwan, Deputy Director of the Technical Policy Division in the Building Safety Portfolio of MHCLG, attended and gave evidence in both an open and closed session. There were no other witnesses.
16. The reported gist of the closed session was as follows:

"The Second Respondent made submissions on its application to redact one sentence of paragraph 63. The witness, Ms Kirwan, provided evidence regarding documents 9 and 10 and addressed the public interest balancing in the content of those documents, as well as some of the general closed themes running through the closed evidence."

Reasons and Conclusions

17. It is not disputed that the Right Honourable James Brokenshire MP, Secretary of State for Housing, Communities and Local Government was a qualified person under S.36 or that he provided an opinion on 23/01/2019 that disclosure would likely inhibit the free and frank provision of advice or exchange of views or would otherwise likely prejudice the effective conduct of public affairs.
18. It is the Tribunal's view that this opinion was reasonably held. The disputed information was shown to the qualified person with information about why it was considered that the information was exempt. The opinion includes reasons why the qualified person decided that the exemption applied. The request, made on 23/02/2018, is for communications from 13/06/2017 to 23/02/2018. The Grenfell fire took place on the night of 13/14 June 2017.
19. The request was considered and refused in March 2018. Policy development and work in response to the Grenfell fire was ongoing in 2018. Hearings for Phase 1 of the Public Inquiry began on 21/05/2018. Part of the terms of reference for this Inquiry is to examine the scope and adequacy of Building Regulations, Fire Regulations and other legislation. At the time the request was considered the issues were current and ongoing.
20. Mr Martin is Head of Technical Policy (Grade 6) at MHCLG. He took up this role on 01/11/2017. Prior to that he was Principal Construction Professional (Grade 7) at MHCLG. He is part of a team responsible for providing policy advice to Ministers in technical areas.
21. The Tribunal consider that the view of the qualified person is reasonable. The information requested remained in an active policy area and continued to be a significant political issue. The Tribunal accept the arguments put forward by

the IC and MHCLG that the Tribunal has to consider whether the qualified person's view is reasonably held and it is clear that there is a strong link between the disclosure and the prejudice identified under S.36.

22. The Tribunal finds that the opinion was reasonable in relation to all the information in the communications. It is not for the Tribunal to consider each bit of information but to consider whether processes may be inhibited by disclosure. It is a reasonable view that these processes of advice and exchange of views would be inhibited if there was disclosure.

23. The exemption is a qualified exemption. Tribunal considered the public interest test. The majority of Mr Greenwood's submission related to the public interest in full disclosure of the advice given to Ministers in the aftermath of the Grenfell fire. The scale of the tragedy and the failure of the cladding to keep residents safe had resulted in a significant loss of faith in government and in previous practices in relation to building safety. He submitted that knowing the advice given by Mr Martin and being able to evaluate whether it was correct outweighs concerns about the need for a 'safe space'. In his view, Mr Martin was a senior, public facing civil servant whose views may be controversial. There should not be 'closed doors' and transparency is in the public interest in order for those affected to feel they are getting the truth about what went wrong.

24. There is strong public interest in disclosure. However, disclosure is taking place through the Public Inquiry and through disclosure of information by the government. This request is very specific. It is for the communications between Mr Martin and the Secretary of State from the date of the fire to the date of request. The importance of civil servants being able to give free and frank advice on request, often at short notice, is important. The Tribunal considered the communications and accepts Ms Kirwal's evidence that this type of advice is central to the working of government and there is a strong

public interest in ensuring that this advice is not inhibited and that there is no prejudice to the effective conduct of public affairs.

25. Ms Kirwal's evidence is helpful in this balancing exercise. The Tribunal accepts that the information sought is a small part of the overall activity which was taking place after the fire and does not reflect the range of advice given and may not even reflect the final advice given. The public interest in disclosure is not significant when the specific information sought is considered. The Tribunal considered that this view was supported by the considerable public disclosure taking place both by government and through the Public Inquiry.
26. On the other side of this exercise, space is needed for government to consider the appropriate response to a major tragedy like the Grenfell fire. Advice is given under significant time constraints. This advice may be developed or amended when it is further considered by the team. Tribunal is satisfied that the public interest in non disclosure outweighs any public interest benefit derived from disclosure.
27. Because of the findings of the Tribunal that all the information is correctly withheld under S.36 it is not necessary to consider the other exemptions.
28. In the circumstances, the Tribunal unanimously upholds the Commissioner's decision and dismisses the appeal.

Signed

R Good

Judge of the First-tier Tribunal

Date: 17 October 2019

Promulgated: 21 October 2019