First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50745325

Appeal Reference: EA/2019/0082/A

Heard at Field House, Breams Buildings, London
On 11-13 February 2020

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

DAVE SIVERS & ROSALIND TATAM

Between

THE CABINET OFFICE

Appellant

and

INFORMATION COMMISSIONER

First Respondent

STUART PARR

Second Respondent

Appearances:-

Appellant: Robin Hopkins, Daniel Isenberg (instructed by Allison McClelland)
First Respondent: Elizabeth Kelsey (instructed by Sonia Taylor)
Second Respondent: did not appear

Cases
AG v Cape [1976] QB 752

Department of Health v IC & Lewis [2015] UKUT 159 (AAC)

DECISION AND REASONS

1. On 19 January 2018 Mr Parr made an information request about one of the most significant constitutional changes of recent times:-

   "I would like to request a copy of the minutes of the 1997 cabinet meetings on devolution along with the terms of reference for the cabinet committee headed by Lord Irvine that the minutes relate to along with any legal or departmental advice provided to the cabinet in relation to these minutes."

2. The Cabinet Office refused the request relying on exemptions contained in s35 of the Freedom of Information Act (FOIA):-

   "35 **Formulation of government policy, etc**

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

   (a)the formulation or development of government policy,

   (b)Ministerial communications"

3. . Mr Parr responded arguing that:-

   "I believe the release of this information is in the public interest and that seeing the minutes 21 years after the event could hardly be described as "premature public scrutiny". Only three members of the Blair cabinet of 1997 when these meetings were held [are still MPs] and they are in opposition. I am not asking for the routine release of cabinet minutes of some meetings that happened 21 years ago. The Information Commissioner has previously ruled that it is in the public interest to release these minutes[1]

4. The Cabinet Office maintained the position on internal review:-

   "It is not relevant whether members of the 1997 Cabinet are still MPs or whether they are in government or opposition. The exemption is to protect collective agreement until the records become "historic" and considered for transfer to the National Archives.

[1] It may be noted that, as Mr Parr correctly stated, there was a previous decision by the ICO (FS50100665 issued on 23 June 2009) that the information within the terms of this request should be disclosed. However, the government of the day used the power in s53 to certify that the individual who had requested the information was not entitled to receive it under FOIA.

Cabinet and Cabinet committee minutes have consistently been seen by the Information Tribunal as requiring a high bar to overturn the public interest in maintaining the protection for collective responsibility. I do not accept that the type of exceptional circumstances that have previously persuaded the Information Tribunal has been reached. In previous cases the Tribunal has only ordered release of parts of cabinet Minutes in matters of international/military conflict or where so many members of Cabinet have written about a particular meeting with different views (i.e. Westland) that publication of the official record would provide clarity. Even in these cases the Tribunal has only favoured releasing small extracts rather than full minutes. Furthermore, the information is still within the period before which it would normally be made public, even under the transition from the 30 to the 20 year rule. We are currently halfway through that transition period and the material you have requested would not be expected to be released until the end of 2020. I have therefore concluded that the public interest significantly favours withholding the information."

5. Mr Parr complained to the ICO. In her decision notice the ICO accepted that the exemptions were engaged. In striking the balance between disclosure of the information and upholding the exemptions (dn 32):-

   The weight to be attached to the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case

6. She noted that devolution had long since occurred. She considered that scrutiny would assist the public in understanding how government considers such issues. She discounted the Cabinet Office's suggestion that disclosure would lead to key discussions taking place outside formal meetings or discourage proper recording of the meetings.

   "Moreover, she believes that the public has a right to expect that government ministers will fulfil their responsibilities in the proper manner and maintain appropriate records."

7. She did not attach weight to the argument that participants in these meetings would expect that detailed consideration of policy options would remain private rather holding that Ministers should expect to be subject to public scrutiny in the development of policy. With respect to the transfer of Cabinet documents to the National Archive she stated (dn 37):-

   The Commissioner is mindful of the age of the requested information, especially given that the 30-year rule relating to historical records is in the process of being reduced to 20 years. The requested information was 21 years old at the time of the request, and if it were not for the transitional arrangements in place the information would have already been considered for transfer to The National Archive and potentially made open records. The Cabinet Office has presented this as an argument in favour of maintaining the exemption and not interfering with the transitional arrangements. However, the Commissioner finds that there is at least an equally weighty public

interest in disclosing the information now, rather than waiting until 2020 when it is due to be transferred and will be 23 years old.

8. She did not consider that the issues in 1997 were now "live" as the policy had long been implemented. The material did not reveal the views of individual Ministers. There was a strong public interest in understanding how the Blair government had considered devolution commenting that *"The different options discussed were either rejected or implemented at the time, and the devolved administrations in Scotland and Wales have been in operation since 1999… At the time the request was submitted, i.e. January 2018, devolution was being discussed in the context of how the devolved administrations were functioning, and the impact of the UK leaving the European Union."*

9. She concluded that the public interest was finely balanced but lay in favour of disclosure.

10. In its appeal the Cabinet Office argued that the ICO had failed to give proper weight to the specific nature of the information requested, Cabinet Minutes and the importance of the constitutional convention of Cabinet Collective Responsibility recognised in law *AG v Cape* [1976] QB 752. It relied on Cabinet Office v IC [2014] UKUT 461 for the proposition:-

    "If for example a tribunal finds (or could on the evidence only properly find) that disclosure of the information would directly impact upon one or more of the public policy concerns underlying s35(1)(a) and/or (b) (e.g. "safe space", collective Cabinet responsibility etc) it may be that the only proper finding would then be that there would necessarily be significant general damage to the public interest resulting from the likely effect on ministerial or the official behaviour in the future…"

11. The Cabinet Office also relied on Department of Health v IC & Lewis [2015] to demonstrate that a contents-based approach to exemption required weight to be given to the significance of maintaining the exemption in itself where the information was of a kind that engaged the exemption where the disclosure would harm the public interest.

12. The Cabinet Office also submitted that the ICO had failed to give weight to the prejudicial consequences of this disclosure on detailed discussions of sensitive issues of constitutional significance. The issue of the division of power between UK institutions and Scottish institutions remained live and controversial in the context of leaving the EU and the 2014 referendum on Scottish independence. The IC had been wrong to find that these issues were not live at the time of the request.

13. The Cabinet Office submitted that the ICO had erred in giving weight to the impact of the Constitutional Reform and Governance Act 2010 ("CRAG") changes which had changed the time period after which government records became historical documents from 30 to 20 years:-

"The fact is that, in accordance with Parliament's intentions as expressed through the transitional provisions of CRAG, the Minutes were not subject to the 20 year rule."

14. The IC had given too much weight to disclosure, while the Minutes were of great importance interest in disclosure was diminished by the availability of other material on these issues.

15. The Cabinet Office further argued that other exemptions s27(1), s28(1), s35(1)(c), s37(1)(a) and 42(1) also applied to parts of the material.

16. In resisting the appeal, the ICO disputed the Cabinet Office claim that she had not considered the nature of the withheld information and the circumstances of the request. She disputed the assertion that there was necessarily a strong public interest in maintaining the s35(1) exemption and asserted that she had followed the approach approved in *Lewis.* She maintained her position that *"the public has a right to expect that government ministers will fulfil their responsibilities in the proper manner."* She disputed the assertion that the re-opening of the debate about devolution meant that discussion of the topic in these minutes was discussion of a live issue. She argued that she was entitled in weighing disclosure under FOIA to consider other statutory provisions and she had weighed the non-applicability of the CRAG 20 year rule against the interest in disclosure. She maintained that there was a strong interest in the public being informed about the government's consideration of devolution and argued that this was not fully met by the fact that some information was already in the public domain.

17. Mr Parr was joined to the proceedings but took no part in them.

Evidence

18. Three witnesses gave written and oral evidence to the tribunal, Lord Butler (the former Cabinet Secretary), Sir Oliver Letwin (a Cabinet Office Minister serving on all cabinet committees from 2010-2016) and Robert Kramer (Director of the Central Secretariat within the Cabinet Office). Lord Butler (who had not seen the disputed material since it was prepared) and Sir Oliver (who had not seen it ever) gave evidence as to the likely impact of disclosure of material such as this on the working of Cabinet Government and the behaviour of Ministers.

19. In his evidence Lord Butler set out the context in which Cabinet committees work emphasising the importance of Collective Cabinet Responsibility as set out in the Ministerial Code:-

"MINISTERS AND THE GOVERNMENT

General principle

2.1 The principle of collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained."

20. He emphasised that it has great significance for ensuring government accountability. Government decisions should be the subject of public scrutiny – were the details of cabinet discussions to be revealed, including the views of individual Ministers, the focus of public debate would shift from the policy itself to discussion of individual views of ministers and have an adverse effect on the quality of public debate and undermine scrutiny of government policy as well as promoting division in government to the detriment of good government. For Cabinet government to be effective there needed to be confidentiality to promote frank debate within the safe space of Cabinet. If there was an expectation that formal communications between ministers and minutes of cabinet meetings would be disclosed this would encourage the circumventing of formal mechanisms in order to maintain confidentiality. Instead of a formal mechanism that collected information and advice from across government to ensure that a proposed policy was assessed in the round and properly recorded; there was a significant risk of less robust and thorough analysis.

21. He noted the previously expressed view of the First-tier Tribunal that Cabinet papers would only very rarely be disclosed before the Public Records Act made them available and that it had been government policy to resist the release of such information under FOIA. As a result, ministers did not anticipate that cabinet records would be released before they became "historical". Ministers acted on the basis of their expectations, were minutes such as these to be released it would change their expectations and they would adjust their behaviour accordingly. There was a significant weight to the public interest in maintaining confidentiality. Despite the ICO's arguments to the contrary Devolution was a "hot topic" at the time of the request and the political sensitivity of the material did not necessarily diminish with the passage of time. `

22. In his view cabinet ministers were acting under a range of competing pressures and they needed some protection from the range of pressures so that they could resolve issues within a safe space. This was not to impute improper motives to them, but to recognise that they were human. It was perfectly possible for a Minister to take part in a decision but still be in disagreement with the outcome, in such a case the choice was to remain and support the decision or to resign. It was not in the public interest to know "blow by blow" what had occurred. Disclosure would inhibit ministers from taking part fully.

A key attribute of the system was that it provided a good audit trail of the making of decisions which gave transparency to for example the Comptroller and Auditor General to understand how money had been spent because the information was there, transparency at the time would not necessarily contribute to good decision-making if ministers did not feel able to contribute freely and openly in cabinet meetings.

23. Sir Oliver emphasised the importance of collective responsibility and that it would become exceptionally difficult for a minister to remain in office if it became widely known that she or he did not agree with government policy. This had been exceptionally important during the coalition government of 2010-2015, however all governments were to some extent coalitions. As a minister he had acted on the assumption that what he had said in Cabinet Committee would not be revealed during his political career. If the position were to change then a Cabinet Committee:-

"would turn into a series of statements akin to what politicians say on a Sunday morning BBC interview. In these circumstances, politicians recognise that the words they use are not simply going to be taken in the way that would be expected in the context of a calm, rational discussion. Rather, what they say will be used by people with particular agendas… This is not a criticism – but rather an inevitable consequence of competitive multi-party democracy. …That form of discourse – were it to prevail in Cabinet Committees as a consequence of an expectation that minutes would be made public – is the opposite of what is needed for effective government."

24. He also emphasised the need for a clear explanation of the arguments leading to a sensitive policy decision to be available to inform civil servants in implementing decisions and the inappropriateness of informal discussions for detailed considerations of policy. If the ICO's decision were to be upheld it would change expectations among Ministers and civil servants as to how such requests would be treated in the future. In considering the public interest there was a trade-off:-

"One cannot have a system of cabinet government which is fully transparent and in which ministers will nevertheless make all the arguments that they are willing to make in private. The public interest lies in striking a balance that maintains effective governance in order to provide the nation with the best possible form of decision-making."

25. Mr Kramer in open evidence described the material:-

"…this type of material is precisely the sort for which section 35 was intended: there are approximately 600 pages of ministers and departments putting forward proposals, debating them, obtaining legal advice… and then going through the proposals in a granular, line-by-line manner to agree a white paper. It is that white paper outcome which is the public face of the policy development process, and which Cabinet Collective Responsibility required all members of the government to stand behind."

26. In closed evidence Mr Kramer discussed the specific content of the material using it to illustrate issues relevant to s35. These included the protection of the candour of discussions by a safe space, the possibility of revealing a divergence of views (and given the large amount of material in the public domain the identification of individuals advancing certain positions even where they were not named in the minutes). Some of those who might be identified were still engaged in politics. He also identified material which attracted the other exemptions – international relations (s. 27 (1)), Law Officers' advice (s31(1)(c)), Communication with the Sovereign (s37(1)) and legal professional privilege (s.42(1)).

Submissions

27. In her submissions the ICO maintained that the exemption under s35 was engaged but the balance of interest lay in disclosure. She argued that the Cabinet Office's submissions were that disclosure of the minutes could result in Ministers altering their approach to what they said in cabinet meetings. She submitted that that submission was contrary to the principle of accountability and transparency of government decisions and the public had a right to expect ministers to fulfil their responsibilities properly not exempt from or in fear of scrutiny. *"concern that ministers may seek to avoid proper scrutiny or accountability cannot be a proper basis on which to find s35(1) is engaged. "*

28. The Cabinet Office argued that the ICO had failed to give due weight to the nature of the minutes which were precisely within the constitutional convention of Collective Cabinet Responsibility that s35(1) was intended to protect from disclosure. The convention required that ministers expressed their views freely within cabinet but supported the cabinet decision outside cabinet after it was taken and this was essential to effective policy making and accountability. The ICO had failed to give weight to the subject matter of the Minutes which were relevant to the division of powers between the different governments within the UK after the UK left the EU. The ICO in emphasising the public interest in the contents of these documents had failed to give weight to the alternative sources of information which were publicly available.

Consideration

29. The issues in this case are narrow, both parties agree that the s35 exemption is engaged, they also agree that the possibility of transfer of these records to the National Archive (formerly the Public Record Office) at the end of 2020 is irrelevant to the issue of disclosure under FOIA. Accordingly, these minutes have not yet been assessed with a view to retention in the Cabinet Office or their transfer to the National Archive as closed records.

30. The ICO in paragraph 43 of her decision acknowledged the significance of cabinet collective responsibility *but is mindful that it is not an overriding factor in the circumstances of this case* was satisfied that that there is a *considerable public interest in the content of the withheld information* and found (paragraph 44) *the public interest is finely balanced*.

31. The reasoning of the ICO in favour of disclosure was set out in the decision notice at paragraphs 20-22:-

" Public interest in favour of disclosing the withheld information

20.The Cabinet Office recognised the general public interest in openness. It further recognised that the decisions ministers make may have a significant impact on the lives of citizens across the UK, and there is a public interest in their deliberations being transparent.

21.The Cabinet Office acknowledged that openness in government may increase public trust in and engagement with the government and has a beneficial effect on the overall quality of government. The Cabinet Office identified a specific, wider public interest in the public being well-informed about the government's policy on devolution.

22.The complainant argued that there was a strong public interest in disclosure of the information in question. He pointed to the fact that the information was 21 years old, and that only three members of the then Cabinet were still MPs, at the time of the request."

32. The ICO, as is her usual practice has relied on the arguments on public interest supplied to her by the person seeking the information and the public authority which is obliged to consider impartially both sides of the question of the balance of public interest.

33. The difficulty with these generalised statements of the legislative purpose of FOIA is that they do not engage with the specific content of the material and address why the disclosure of this information in this specific form (amounting to some hundreds of pages) will be of benefit. The cabinet committee was set up to advance the commitment the incoming government had made to devolve power to authorities elected by the people of Wales and Scotland. The results of its efforts were White Papers and Acts of Parliament; the Parliamentary process resulted in numerous speeches by Ministers explaining the policy behind the provisions of the Bills. There was coverage in the mass media and over the years both before and after the passage of those Acts considerable political, public and academic comment and analysis of issues raised. A very large proportion of the substantive information contained within the disputed material is therefore already in the public domain. Issues of what was to be done by the legislation, how it was be done and the potential pitfalls of the various policy options were exhaustively explored in public. There has been no attempt by either party before the tribunal to explore what,

within these pages, is or is not already in the public domain. It would be a substantial undertaking to do so; however in order to identify the benefit of the disclosure when it is clear that the vast majority of the information is already in the public domain (as inevitably must be so in a case such as this) it is difficult for the tribunal to perceive more than a very modest increment of information being added to what is already known on such a widely debated and researched subject. It is likely that the most that can be garnered from the information is perhaps nothing more than an indication that a policy issue that was or was not contentious in Cabinet committee could on comparison with subsequent debate could be seen as contentious or not.

34. The ICO acknowledged the significance of the constitutional convention of Cabinet Collective Responsibility however in her decision notice she discounted the significance of the expectation of Ministers that their discussions would remain private and set up an Aunt Sally *"it is unreasonable for any minister to expect that policy development and decision making should be exempt from any scrutiny"* .

35. Ministers however are very aware of press comment and also of the aphorism (attributed to both Hartley Shawcross and (incorrectly) Winston Churchill):- "The opposition are in front of you, but the enemy is all around you." Ministers are competitive individuals who are concerned to succeed as Ministers, remaining popular with the disparate elements in their party and the public at large. Cabinet Collective Responsibility promotes a degree of cohesion and consistency which enable the government to function rather than falling apart under external pressures and the individual ambitions of Ministers. Lord Butler and Sir Oliver gave a very clear account of the importance of this convention in enabling thorough and considered policy formation. By holding all Ministers to a settled cabinet position, it encourages Ministers to strive to produce a robust joint decision, rather than seeking to exculpate themselves from any odium which may attach to it. While the ICO is right to say that the public is entitled to expect that "*ministers will fulfil their responsibilities in the proper manner*" it is inevitable that individuals will respond to some extent to the circumstances in which they find themselves. The tribunal was satisfied that both Lord Butler and Sir Oliver had a robust and clear-eyed understanding of how Ministers were likely to behave in responding to what they would see as a significant erosion of the accepted practice of cabinet confidentiality, they were likely to be somewhat inhibited in some contributions and seek to move discussions and decisions away from formal Committee meetings. While unattributable briefings and leaks provide some information/misinformation about Cabinet discussions their uncertain reliability and deniability within the framework of Cabinet Collective Responsibility mean that they do not usually have the impact on behaviour of Ministers that a significant possibility of the release of Cabinet papers would have.

36. The benefits which would flow from disclosure of this information when requested in early 2018 are on balance relatively slight given the extent of the availability to the public of the arguments about the devolution process in 1997. The exemption is engaged. It is there to protect Cabinet Government and the disclosure of this information would undermine the high degree of confidence of Ministers that their deliberations would not be disclosed. To disclose this information would be likely to impact on Ministerial behaviour resulting in significant damage to the public interest by harming the thorough consideration and recording of the reasons for decisions. The tribunal is satisfied that the public interest lies in not disclosing the information.

37. The appeal is allowed.

38. In the light of the tribunal's finding on the application of the exemption relating to the formulation of government policy it is unnecessary to consider in detail the other exemptions claimed by the Cabinet Office, however from a consideration of the closed bundle the tribunal is somewhat surprised by the Commissioner's claim in the skeleton argument that she "is not satisfied that the withheld information, on its face *self-evidently* falls within the relevant exemptions" since there are within the material clear references to the advice given by government lawyers and other clear indications which at the very least flag up the potential for the various exemptions claimed.

As amended on 15 May 2020, under Sect 40, Slip Rule Corrections

Signed C Hughes
Judge of the First-tier Tribunal

Date: 21 April 2020
Date Promulgated: 11 May 2020