First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50811968

Appeal Reference: EA/2020/0080

CONSIDERED ON THE PAPERS

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

RAZ EDWARDS & NAOMI MATTHEWS

Between

CABINET OFFICE

Appellant

and

INFORMATION COMMISSIONER

First Respondent

MARTIN ROSENBAUM

Second Respondent

Case:
Cabinet Office v Information Commissioner & Stuart Parr EA/2019/0082

DECISION

The appeal is allowed.

REASONS

1. On 24 August 2018 Mr Rosenbaum wrote to the Cabinet Office:-

"Please send me copies of all the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions for 1997 and 1998."

2. The Cabinet Office refused relying on FOIA s35(1)(a) and (b) and maintained that stance on internal review. Mr Rosenbaum complained to the Information Commissioner who, after investigation issued a decision notice requiring disclosure. The Cabinet Office has appealed.

3. On 19 January 2018 Mr Parr made a somewhat similar request to the Cabinet Office:-

   "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."

4. That request followed a similar route to this one. The possibility of hearing that case with this one was explored but not adopted. The Cabinet Office appeal against the Information Commissioner's decision in favour of Mr Parr was heard on 11-13 February 2020, the tribunal found in favour of the Cabinet Office and that decision was not subject to appeal and that decision is binding between the parties with respect to the material within scope of that appeal.

5. This appeal has been considered on the papers, the Cabinet Office has in support of this appeal submitted the witness statements of the witnesses who gave evidence and were subject to cross-examination in *Parr*, all parties have, in addition to their pleadings submitted written arguments addressing the merits of this appeal, its relation to *Parr* and the distinction between the two cases.

6. The parties prepared an agreed schedule of issues in dispute in the case:-

   The parties' proposal is that the Tribunal address on a preliminary basis the applicability of s. 35 FOIA in light of the decision in Parr (and, insofar as they are relied on by the Appellant on an equivalent basis to s. 35 FOIA, also Regulations 12(4)(e) and 12(5)(d) of the Environmental Information Regulations 2004). If the Appellant's reliance on these exemptions is refused by the Tribunal, the other exemptions relied upon by the Appellant in the Grounds of Appeal (ss. 37, 42, 35(1)(c), 27 FOIA) are to be considered at a subsequent hearing.

   Section 35(1) FOIA
   1. It is common ground between all parties that s. 35(1)(a) and (b) are engaged in respect of the totality of the disputed information.

   2. Does the public interest favour maintaining that exemption? In particular:

a. What approach should the Tribunal take to its recent decision in Parr in the context of this Appeal? To what extent is the decision in Parr relevant to the determination by the Tribunal of the issues in the present appeal? Has the Commissioner adopted a position inconsistent with the finding of the Tribunal in Parr? If so, is it open to the Information Commissioner to adopt a position in circumstances in which she did not appeal the Parr decision?

b. Would disclosure damage the principle of collective Cabinet responsibility or have a chilling effect on future discussions?

c. What is the impact, if any, of the passage of time since the information was created? Do the matters under discussion in the disputed information (relating to devolution) remain live and controversial?

d. Did the Commissioner err by having regard (by analogy) to the 20 -year rule set out in the Constitutional Reform and Governance Act 2010 (recognising that the disputed information is not subject to the 20 year-period by virtue of the transitional provisions)?

e. What is the public interest in the disclosure of the disputed information?

f. What is the correct approach to evaluating, in a case such as this, whether information is in the public domain and who bears the burden of assessing this? To the extent the requested information is already in the public domain, how does this impact on the public interest assessment?

g. In all the circumstances, does the balance of the public interest favour maintaining the exemption?

EIR

3. Does any of the information amount to environmental information under Regulation 2(1) of the EIR?

Regulation 12(4)(e) EIR

4. If so, does that environmental information constitute "internal communications" (it being common ground that s. 35(1) FOIA is engaged)?

5. If the exception is engaged, does the public interest favour maintaining that exception?

Regulation 12(5)(d) EIR

6. If so, would disclosure of that environmental information adversely affect the confidentiality of proceedings – specifically, meetings of Cabinet – that is protected by law?

7. If the exception is engaged, does the public interest favour maintaining that exception?

7. While this schedule is of use, the tribunal does not consider that in order to come to a fair determination of the issues it needs to come to a conclusion on every issue identified. In particular, irrespective of the stance taken by the IC, Mr Rosenbaum is entitled to have the position he has adopted in seeking this information and resisting the appeal tested on its merits and insofar has he has adopted or relied on the reasoning of the then those arguments need to be considered. Mr Rosenbaum argued in his submissions:-

    - His request must be considered afresh and must be given full and proper deliberation in its own right.
    - The requests are not identical and the public interest relating to the 1998 material has to be assessed on its own merits not pre-determined by the *Parr* decision.
    - The *Parr* decision did not assess the information under the EIR regime, with its presumption in favour of disclosure (EIR regulation 12(2)).
    - Whatever view was taken on the IC's position, his request and the arguments deserve proper consideration by the tribunal.

8. Mr Rosenbaum argued that a distinction should be drawn between disclosure of recent cabinet material, to which the evidence of Lord Butler and Sir Oliver Letwin was relevant and the impact of disclosure of material which was over 20 years old at the date of the request and was now due for transfer to the National Archive under the provisions of the Constitutional Reform and Governance Act 2010 and that disclosure now would be unlikely to impact on current ministers' behaviours. He emphasised that at the date of hearing the material would be scheduled for transfer to the National Archive. The proximity of the CRAG

9. He argued that there was a public interest in transparency about major decisions which affected the current constitutional arrangements, and the disclosure would help to explain the factors behind the current institutional and power structures which regulate people's lives and are the focus of their democratic participation. It would also lead to better informed appreciation of the historical background to current policy debates.

10. In considering 2f (above) he argued that it was the Cabinet Office's responsibility to evaluate this as part of assessing the balance of public interest and submit this to the IC who could have considered it as part of her evaluation of the complaint. He commented "*it is possible that the Cabinet Office has made or is making such an evaluation anyway, at least partly, as part of the process of consideration of records of this age for opening at the National Archives*" and emphasised the importance of the official record being disclosed (relying on the tribunal case EA/2009/0031 which resulted of the disclosure of cabinet minutes to Mr Rosenbaum):-

"There is always a significant public interest in reading the impartial record of what was transacted in Cabinet, no matter what other accounts of it have reached the public domain. Where the usual interest in maintaining confidentiality has been significantly weakened, that interest may justify disclosure."

11. He further argued that disclosure of the information was overwhelmingly in the public interest and similar arguments applied to the environmental information.

12. The IC maintained the position adopted by the decision notice, that the exemptions were engaged and that the balance of public interest lay in disclosure. With respect to one of the findings in *Parr,* that disclosure would not add significantly to public understanding, criticised the Cabinet Office for not carrying out the analysis.

Consideration

13. All parties have agreed that the s35(1) exemptions are engaged.

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,

14. The relevant EIR exemption is in regulation 12:-

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(d)the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

15. The proceedings of cabinet committees are protected by confidentiality and this is not a case where the distinction between FOIA and EIR is significant and therefore it is not necessary to consider whether, given the remoteness in time (the legislation which resulted from the cabinet consideration had been implemented nearly 20 years before the request), the requested material is a measure *affecting or likely to affect the elements and factors* of the environment. The scrutiny of the environmental effects of the Scotland Act 1998 is a matter which would require the analysis of the period since it came into force, not the review of any information contained in cabinet minutes.

16. Mr Rosenbaum's arguments as to the date when the records would have been considered for transfer to the National Archive do not carry weight, at the relevant time the records were not due to be transferred to the National Archive. There is no information before the tribunal of any steps which had (whether at the time of the internal review or subsequently) been taken to assess material for transfer to the National Archive.

17. The tribunal notes the argument forcibly advanced by the Information Commissioner that what she describes as "authoritative information" on the specific policies, issues and concerns of the cabinet is qualitatively different from "generalised discussions" by academics and the media, or Statutes, Bills, White Papers, Ministerial statements and other publications. The weight given to these claims would have been enhanced if there were evidence or analysis of differences between the public record and the Cabinet Minutes. The tribunal in *Parr* considered that to do this would be a substantial undertaking and no party to these proceedings has indicated a willingness to carry this out.

18. While the information requested in this case and in *Parr* is not identical much of the information is common to both and there are no material distinctions arising from the information.

19. In *Parr* the tribunal accepted the evidence of Lord Butler, Sir Oliver Letwyn and Mr Robert Kramer with their understanding and experience of the issues around Cabinet Government and the impact of disclosure.

20. Lord Butler emphasised the importance of the Ministerial code which sets out how Ministers discharge their responsibilities:-

    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."

21. Lord Butler noted that the reluctance of the tribunal to order the disclosure of cabinet papers meant that Ministers continued to act on the basis that cabinet papers would not be released before they were transferred to the National Archive as historical records. If that were to change then behaviour would be likely to change.

22. Mr Kramer's comments on the nature of the material and its relation to the next stage of the legislative process, the white paper is particularly pertinent:-

    "…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."

23. Sir Oliver's analysis of the impact of disclosure on ministerial behaviour in cabinet meetings had weight. The discussions:-

"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 fairly identified the impact of an erosion of cabinet collective responsibility:-

"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. While the ICO stated that the devolution settlement is of both considerable historical and contemporary public interest, Mr Rosenbaum argued that:-

"Much of the evidence from both Sir Oliver Letwin and Lord Butler concerns the benefits of collective responsibility when applied to the public presentation of current government decision-making in the here and now. I accept that this constitutional convention does have benefits when applied to current accountability for current government policy. But such evidence is irrelevant to the matter at issue in this case, which concerns discussions that occurred 22 to 24 years ago."

26. This goes to a significant problem for the Respondents with so much material in the public domain. The release of the cabinet papers would be unlikely to provide significant new material which would assist in the current policy discussions, however it would erode the confidence that Ministers have now that cabinet papers will remain confidential until they are transferred as historic records. The public interest in disclosure is slight, the harm of disclosure is that it would further erode the Ministerial code which sets out the standards of conduct expected of ministers and how they discharge their duties.

27. The tribunal has considered the evidence submitted to it and considered the persuasive evidence and analysis in *Parr*. The tribunal adopts the reasoning in *Parr*.

28. The appeal is allowed.

Signed Hughes

Judge of the First-tier Tribunal

Date of Decision: 17 May 2021
Date Promulgated: 18 May 2021