



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2020/0154 V

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50881024

Dated: 7 April 2020

Appellant: Edward Williams

First Respondent: The Information Commissioner

Second Respondent: The Home Office

Before

HH Judge Shanks

and

Anne Chafer and Paul Taylor

Hearing by CVP on 2 March 2021

Representation:

Appellant: in person

Information Commissioner: did not appear

Home Office: Aaron Moss

Subject matter:

Freedom of Information Act 2000 (FOIA)

Section 24 (National security)

Section 27 (International relations)

Section 31 (Law enforcement)

Section 35 (Formulation of government policy)

Section 38 (Health and safety)

Section 40 (Personal information)

DECISION

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

REASONS

Introduction

1. This appeal arises out of a FOIA request made on 26 June 2019 under which Mr Williams seeks disclosure of 26 named reports by the Extremism Analysis Unit in the Home Office, which were mainly concerned with Islamist extremism and far or extreme right wing groups and activities. The Home Office relied on section 35 of FOIA to resist disclosure and the Information Commissioner upheld that approach. The Home Office has also relied on sections 24, 27, 31, 38 and 40 in relation to parts of some of the reports but the Commissioner did not consider those exemptions in her Decision Notice dated 7 April 2020.
2. The parties agreed that the appeal could be determined without a hearing and it was listed before us to be determined on the papers. On 8 October 2020 we issued an interim decision to the effect that section 35 applied to the requested information and gave directions requiring the Home Office to serve further

material relating to the public interest balance in relation to section 35 and to the other exemptions relied on and for a remote hearing to be held to determine all outstanding issues in the appeal.

3. The Home Office then served an Amended Response; open and closed witness statements from Panos Zerdevas, who is Deputy Director of the Counter-Extremism Analysis and Insight Unit at the Home Office (which brought together the work of the Extremism Analysis Unit and another team within the Home Office; we shall refer to them all simply as the “Unit”); and open and closed skeleton arguments. Mr Williams and the Commissioner chose not to serve any further material and the Commissioner did not appear at the (remote) hearing. Mr Williams appeared in person and questioned Mr Zerdevas and addressed the Tribunal. Mr Cornwell, who had been instructed as leading junior by the Home Office, was unfortunately unable to attend for personal reasons. We refused an application for an adjournment based on his absence made by his junior Mr Moss which was resisted by Mr Williams. However, we wish to record and commend the hard work that Mr Cornwell has clearly done on the case as reflected in particular in the full and helpful skeleton arguments served on behalf of the Home Office.

Factual background

4. The purpose of the Unit’s work is to provide government, including Ministers, with information and analysis relating to extremism which may impact on the UK and its interests. In this work the following definition of extremism from the Government’s Counter Extremism Strategy is applied:

... the vocal and active opposition to our fundamental values, including democracy, the rule of law, individual liberty, and respect and tolerance for different faiths and beliefs ...

Although clearly not all extremists are necessarily terrorists, the activities of extremists not only tend to sow division among communities in the UK but also create a fertile environment for radicalisation and potential engagement in hate

crime and terrorism; and some extremist groups may seek to hide more harmful activities and views.

5. The Unit's reports are designed to give their government readership an understanding of extremism and the way extremists work, including the individuals involved, group structures, funding, activities, networks etc, their ideologies and the harm they cause or may cause. The reports rely on a variety of sources including open source material, academic research, and input from partners within and outside government, including the police (see para 61 of Mr Zerdevas's statement). The Unit's work is designed to support the design of better and more targeted approaches to extremists and extremism, including informing the Government's Counter Extremism Strategy and more specific interventions.

6. The 26 reports in question were produced by the Unit between March 2015 and March 2018. As stated, they mainly concern Islamist and far/extreme right wing extremism; but there are some dealing with general topics and others with specific topics like the Sikh community. The titles of the reports were obtained by Mr Williams under an earlier FOIA request in March 2019, although Mr Zerdevas was unaware of this at the time he made his witness statement dated 4 December 2020. We have been provided with copies of the reports by way of closed material.

The main issue on the appeal

7. We have already decided that the information in the reports is covered by section 35 of FOIA since it plainly "... relates to ... the formulation or development of government policy" (as provided in section 35(1)(a)). The main issue remaining is therefore whether the public interest in maintaining the section 35 exemption outweighed the public interest in disclosure.

8. The public interest in maintaining the section 35 exemption is ultimately that of promoting good and effective government, in particular by protecting the

confidentiality of advice and discussions within government so as to provide a “safe space” allowing for robust discussions and full and frank advice to take place in the course of formulating and developing policy. Section 35(4) makes specific provision in relation to the public interest balance which is relevant in this case; it provides that in weighing the public interest in disclosure:

... regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

Public interest in maintaining the section 35 exemption

9. The starting point, which we do not consider to be controversial, is that extremism and the threats it presents to society are matters of great public concern and that there is a very substantial public interest in the Government being able to formulate and develop policies to counter extremism which are as effective as possible. It is plain that the work of the Unit is designed to help in this endeavour and the Government properly considers that its work is of substantial value in making such policy. It follows that there is a strong public interest in the Unit being able to continue to carry out its work effectively and provide the best possible analysis and advice to government (in the widest sense).
10. Mr Zerdevas’s evidence is that disclosure of these reports would undermine the work of the Unit in various ways which would damage the public interest reflected in section 35. He referred to four related mechanisms by which this would happen.
11. First, he says disclosure of the reports would provide information which would be useful to the very people the reports are about: they would show which groups and individuals were known of and of interest (and inferentially those that were not), what was known (and not known) about them; they would show the Unit’s assessments of their motivations and likely success and assessments of the effectiveness of current government activity against them; and they would show the methods and capabilities of the Unit, which have not changed

markedly, so that groups could change their methods making it more difficult to track their activities in future. These effects would tend to undermine the on-going effectiveness of the Unit's work and the ability of government to make effective policy to counter extremism.

12. Second, judgments expressed in the reports, or judgments as to what was included or not included, may well be controversial. Given the sensitivities surrounding the topic of extremism publication of the reports could lead to increased tensions between communities and exploitation by the groups the reports are about, directly contrary to the underlying policy aim of countering extremism.
13. Third, those potential effects would have a "chilling effect" on the writers of reports by the Unit going forward. If it was perceived that there was a significant risk of the contents being disclosed to the world at large, including extremists, the Unit would feel a need to be careful in the way the reports were drafted; as a consequence they may not be as full and open as they otherwise would be because the writer would inevitably have an eye on public disclosure.
14. Fourth, publication of the reports would undoubtedly result in media and public comment and controversy which would put pressure on the writers to include unnecessary explanations and caveats or avoid saying things which might stir up tensions and which would lead to the Home Office being distracted by constantly having to "firefight" to justify the contents of reports. These effects would not, he says, reflect a lack of "courage and independence" on the part of officials or arise as a result of possible ministerial embarrassment but would be a straight consequence of a risk of disclosure. A related and important point was that the contents of the reports are based in part on information provided by third parties in confidence who may well be unwilling to provide information if there is a real risk of public disclosure. Overall, Mr Zerdevas's belief is that the quality of the Unit's reports would suffer if they were in danger of being disclosed to the public.
15. Mr Zerdevas accepts that much of the material in the reports is "open source", that is available, particularly on the internet, to anyone who cares to look. He

acknowledges that this might indicate that there is little public interest in that material remaining confidential. But, he says, what the Home Office seek to protect is not the material itself but the fact that it is of interest and why, and the commentary surrounding it. This relates to a point made strongly by Mr Williams to the effect that the reports should at least be released in redacted form so as to disclose in particular the factual material on which they are based, as encouraged by section 35(4) of FOIA. Mr Zerdevas answered this point by repeating that the fact that particular open source material is included (and indeed not included) in the reports is what is significant and confidential, rather than the open source material itself; that the reports give commentary related to open source material which is what is of real interest to the readers of the reports; and that the open source material itself can be obtained by the public without recourse to the reports, which itself goes to lessen the public interest in its disclosure. These seem to us valid responses to Mr Williams's point.

16. Mr Williams makes various other points in relation to the weight of the public interest in maintaining the exemption. He reminds us that the reports were "not fresh". It is right that the reports were between one and four years old when requested. However, Mr Zerdevas points out that countering extremism is an on-going process and that the contents of older reports would still have been relevant to the process and that the methods of collecting information and the analytic techniques used by the Unit as shown by the reports in question were still the same. Although we could not accept Mr Zerdevas's implied suggestion that it would never be possible to release the reports, we accept that this is a valid response as at June 2019.
17. Mr Williams said that if the contents of the reports were as confidential and important as Mr Zerdevas suggests their creation would be the responsibility not of a unit in the Home Office but of the police and/or the security services. Mr Moss pointed out in his submissions in response that the subject matter of the reports is extremism rather than crime or terrorism and that in any event the Home Office is the department with overall responsibility for the police and security and that the police and security services are part of the process of providing and receiving the information which is put into the reports.

18. Mr Williams referred to a particular report entitled “Sikh Marriage Disruptions in the UK” and suggested that it was hard to see how publication of a report on this topic could be against the public interest. We have looked back at the contents of this particular report in the course of preparing this decision and it seems to us that the points made by Mr Zerdevas remain as pertinent in relation to this report as in relation to others, albeit the subject matter may be less immediately concerning in the wider community than reports about Islamist or right wing extremism.
19. Mr Williams also made the point that there are community tensions in existence already which are nothing to do with these reports. Again, that is clearly the case but Mr Zerdevas’s concern is that such tensions may *increase* if reports are disclosed.
20. Having read his statement and heard him answering questions we are, perhaps unusually, impressed by the “chilling effect” argument as well as the other points Mr Zerdevas makes in favour of withholding the reports at this stage. Two factors are of particular significance in this assessment: first, the very serious subject matter of the reports and the importance of making effective policies in relation thereto and, second, the on-going nature of such policy development and the associated work of the Unit. Overall, having regard to the contents of the reports themselves and Mr Zerdevas’s evidence (both open and closed) and taking into account the points made by Mr Williams, we consider that as at the time of the request there was a very strong public interest in maintaining the section 35 exemption and keeping the reports confidential.

Public interest in disclosure

21. Plainly the overall subject matter of the reports is of great public concern and Mr Zerdevas says at para 14 of his open statement that the Home Office accepts that there is indeed a strong public interest in the public learning about the risks extremism poses and the way the government is approaching the problem and developing policy in response. That in our view is an entirely appropriate

concession. We also accept his point made at para 39 and already referred to above that in so far as the reports contain publicly available factual information the public interest in disclosure of the reports is reduced.

22. In his oral representations Mr Williams developed the public interest arguments by reference to his own position as a concerned citizen. He referred to the danger of terrorism and his legitimate concern as a citizen going about his ordinary business to know about particular threats and what the government is doing about them. We of course accept that these are matters of grave concern to the public as a whole, but we must also note that the reports in question are about extremism, which *can* lead to terrorism and to specific acts of terrorism but not necessarily in a direct way. And we were not attracted by his argument that if citizens are informed about who the people concerned are “... we [ie citizens] can take appropriate action as regards our safety.” We do not consider it would be in the public interest for material to be made public in order to allow citizens to take direct action of their own in the way we understood him to be suggesting; we consider that such issues are best left to the judgment of the public authorities.

23. Mr Williams also said that as a taxpayer he has a right to know how his taxes are being spent and that, looking at the titles of the reports, he was driven to question whether the money spent on the reports could not be better spent by “having boots on the ground”. His general point is of course very valid and he is entitled to his views as to how taxes should be spent in countering extremism. However, having seen the reports and heard Mr Zerdevas’s evidence, we see no reason to think that they may represent a waste of public money or not be a helpful contribution to a much wider response by government to a very serious problem.

24. Mr Williams specifically refers in his Reply document to section 35(4) of FOIA. We have regard to this provision, though as we have already mentioned much of the factual information in the reports is publicly available and the policy response to extremism is obviously on-going and constantly developing.

Conclusion on public interest balance

25. We have considered the weight of the respective public interests. With the benefit of more evidence and argument than was available to the Information Commissioner and having regard particularly to the considerations set out above, we have come to the firm view that she was right to decide that the public interest balance at the time of Mr Williams's request was substantially in favour of maintaining the section 35 exemption. This conclusion takes into account section 35(4) and relates to the full contents of all 26 reports.

Overall conclusion

26. It follows that the Home Office was entitled to rely on section 35 to withhold the reports in response to Mr Williams's request and that his appeal must be dismissed.

27. Given our clear conclusion on the section 35 issue which covers the entirety of the requested information we, like the Commissioner, have decided not to go on to consider in detail the other exemptions relied on, which cover only parts of some of the reports. In case it becomes relevant at a later date we record here (a) that Mr Williams accepted that the Home Office would be entitled to redact the names of officials under section 40 and (b) that he raised an issue on section 24 to the effect that it cannot be relied on in relation to information to which section 23 applied.

28. We also record that Mr Williams conceded at the hearing that it was not open to him in the First-tier Tribunal to rely on Art 10 ECHR in the context of pursuing

his FOIA rights but that he reserved the point should the matter proceed to an appeal.

29. For these reasons we dismiss the appeal. Our decision is unanimous.

HH Judge Shanks

(First Tier Tribunal Judge)

Date of Decision: 10 March 2021

Date Promulgated: 11 March 2021

Amended under “slip rule”: 18 and 20 March 2021