First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2020/0207P

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Emma Yates
Aimée Gasston

Determined, by consent, on written evidence and submissions
Considered on the papers on 1 June 2021.

Between

Rob Allen

Appellant

-and-

The Information Commissioner
Ministry of Justice

Respondents

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.

3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 98 and a closed bundle.

BACKGROUND

4. On 2 October 2019, the Appellant wrote to the Ministry of Justice (MOJ) and requested information in the following terms:-

> "I would like to see a copy of the Sentencing Review carried out by the MoJ, whose results were announced yesterday".

5. The MOJ responded on 29 October 2019. It refused to provide the requested information. It cited the exemption in section 35(1)(a) FOIA as the reason (formulation of government policy etc) to justify the refusal. Following an internal review, the MOJ wrote to the Appellant on 25 November 2019, maintaining its position.

6. The Appellant contacted the Commissioner on 23 January 2020 to complain about the way his request for information had been handled. He disputed the reasons for withholding the requested information, on the basis that the review had been publicly announced and should be disclosed.

THE LAW AND GUIDANCE

7. Section 35(1)(a) FOIA states that:-

> "(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…

8. If the exemption applies it is subject to a public interest test which can nevertheless lead to the disclosure of the information if the public interest in disclosure outweighs the public interest in withholding the information.

9. The Commissioner has produced guidance on the application of s35(1)(a) FOIA which includes the following:-

> 9. Section 35 is class-based, meaning departments do not need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described. The classes are interpreted broadly and will catch a wide range of information.
>
> 23. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
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> 26…. In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives.
>
> 42. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy: the final decision will be made either by the Cabinet or the relevant minister; the government intends to achieve a particular outcome or change in the real world; and the consequences of the decision will be wide-ranging.
>
> 45. The classic and most formal policy process involves turning a White Paper into legislation. The government produces a White Paper setting out its proposals. After a period of consultation, it presents draft legislation in the form of a bill, which is then debated and amended in Parliament. In such cases, policy formulation can continue all the way up to the point the bill finally receives royal assent and becomes legislation.

> 79. The key public interest argument for this exemption will usually relate to preserving a 'safe space' to debate live policy issues away from external interference and distraction. There may also be related arguments about preventing a 'chilling effect' on free and frank debate in future and preserving the convention of collective responsibility.

THE DECISION NOTICE

10. The decision notice in this case is dated 10 June 2020 (reference FS50904899). The decision notice sets out the explanation of the MOJ as follows:-

> 20…It confirmed that it was announced on 12 August 2019 that the MOJ would conduct "an urgent review ordered by the Prime Minister, to ensure the public are properly protected from the most dangerous criminals". It also advised that, on 1 October 2019, the Lord Chancellor and Secretary of State for Justice, made a written statement to Parliament. In that statement, he said:
>
> > "Based on the findings of the review, we will be bringing forward proposals shortly for a comprehensive package of legislative reform….Our proposals to reform the sentencing and release framework complement the raft of initiatives we are taking as a Government to fight crime and protect the public from its devastating consequences. As we continue to develop policy and before legislating, we will consider fully the impact of the proposals and have due regard to the requirements of s149 of the Equality Act 2010".

11. The request in this case was made the day after the 1 October 2019 announcement. The Commissioner records the MOJ's account that 'the information in the sentencing review forms part of ongoing policy discussions and releasing this information could affect the MOJ's approach to developing a policy position on sentencing'.

12. In concluding that the exemption was engaged, the Commissioner stated that she:-

> 25. …understands that the current policy on the sentencing of violent and sexual offenders, as well as the sentencing of the most prolific offenders, is under review to consider whether changes in legislation would be required to ensure the public are properly protected from the most dangerous criminals.

13. In relation to the public interest test the Commissioner concluded that the balance of the public interest favoured non-disclosure:-

> 39. The Commissioner accepts that there is a general public interest in openness and transparency. She also accepts that there is a public interest in the issue of sentencing reform, particularly where it relates to ensuring that the public are adequately protected.

…

41. She gives weight to the MoJ's arguments that disclosure in this case would directly harm the effectiveness of the policy itself. The Commissioner accepts that the information reveals details of policy options, and that the policy making process is still ongoing. She therefore finds that the safe space arguments carry significant weight.

42. She considers the timing of the request is also relevant in this case. In that respect, the Commissioner recognises that the written statement on 1 October 2019 did not go into detail regarding policy that would lead to a conclusion that the policy had been fully developed. She gives weight to the argument that it is not in the public interest to disclose information, which contains a wide range of options and evidence, while the issues are still live and under review.

…

44. In the Commissioner's view, disclosure of the withheld information presents a significant risk of undermining the confidential space needed by the MoJ to discuss policy making in this area, and moreover presents a genuine risk of encroaching on the candour of any future discussions in respect of such policy making.

THE APPEAL

14. The Appellant's appeal is dated 29 June 2020. The Appellant argues that '…if a government department conducts a review which seeks the view of members of the public or stakeholders, it should be published so that it is transparent whether the decision reflects the views of those who have submitted them'.

15. He points out that unless the report is published 'it is not possible to know whether the decisions reached during the review properly reflect the evidence which was presented by the stakeholders'. The Appellant adds that:-

"A specific decision was reached at the end of the review. I cannot see the relevance of the argument that the MoJ continues 'to explore options which could potentially result in significant reforms'. It is therefore essential that we are able to have open discussions with Ministers in the future, without external scrutiny. If the information was disclosed, it could have a detrimental impact on policy development"' [this is a quote from paragraph 32 of the decision notice.].

16. The Appellant is of the view that it is "…likely that the MoJ do not want to make the review public because it may reveal the fact that there was little support among stakeholders for the course of action ultimately chosen".

17. In response the Commissioner has repeated the reasons in the decision notice for finding that the exemption in s35(1)(a) FOIA applies and notes that the Appellant has not directly addressed its applicability. The Commissioner suggests, though, that the Appellant is arguing that the period of policy formulation has come to an end. The Commissioner relies on the case of *DfES v Information Commissioner & the Evening Standard* (EA/2006/0006, 19 February 2007) to the effect that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, and that the announcement of a policy will normally mark the end of the process of formulation.

18. The Commissioner notes that at the time of the request the MOJ said there had been no announcement of specific options that would mark a clear end to the formulation of policies. According to the MoJ, new sentencing legislation would in due course be presented to Parliament. Policy formulation would likely be ongoing until it receives royal assent.

19. The Appellant provided the following information in reply:-

> The Commissioner is right that I seek to argue that a decision has been made (by the MoJ) following the Sentencing Review and that, in respect of the most significant question being reviewed, the period of policy formulation and development is therefore concluded.
>
> When the Prime Minister announced the Sentencing Review on 12 August 2019, the press release said that "the work, to be kicked off immediately, will focus on violent and sexual offenders and whether they are serving sentences that truly reflect the severity of their crimes. It will consider whether changes in legislation are needed to lock them up for longer – by not letting them out part-way through a sentence".
>
> On 1st October 2019, Justice Secretary Robert Buckland told the Conservative party Conference that that for the most serious violent and sexual offenders … this Conservative Government will abolish automatic early release at the halfway point". Two weeks later the Queen's Speech on 14 October 2019 duly announced a Sentencing Bill which would change the automatic release point from halfway to the two-thirds point for adult offenders serving sentences of four years or more for

serious violent or sexual offences, bringing this in line with the earliest release point for those considered to be dangerous.

On the same day as the Queen's speech, the Lord Chancellor Buckland tabled in Parliament the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2019. This Statutory Instrument (SI) would have brought the same change into force from April 2020- much sooner than primary legislation would have allowed- but for prisoners sentenced to seven years or more, rather than four. (Buckland explained the different thresholds to the Justice Committee on 16 October in terms of "trying to make sure that we create a system that is supported by the resources I need".)

As it turned out the House of Lords Secondary Legislation Scrutiny Committee drew the SI to the special attention of the House on the ground that it gave rise to issues of public policy likely to be of interest to it. The dissolution of parliament meant that neither the Sentencing Bill nor the SI did become law before the election. However, following the election, the SI was reintroduced and came into force on 1 April 2020.

20. The Appellant's point is that a clear decision had been reached 'in October 2019' and efforts made to introduce it into legislation:-

These were successful after the election and the question raised by the review to which I am seeking access- whether changes in legislation are needed to lock up sexual and violent offenders for longer – has been answered.

The Information Commissioner is, with respect, incorrect to say that "an ultimate course of action has not yet been chosen." Nor is it correct to say that it would be impossible for me to compare the views of the stakeholders with the course of action, when that course of action has not been chosen.

In the circumstances, there seems no weight in the "safe space" argument and nothing to prevent the review being published.

21. The MOJ also responded to the Appellant's appeal. It argues that:-

23. In this case, it is true that the results of the Sentencing Review were announced on 1 October 2019, which preceded the Request by one day and the internal review by nearly two months. However, the process of policy formulation and development was not complete at that point.

24. In December 2019 the Government announced in the Queen's Speech that it intended to bring forward legislation to implement changes to sentencing. The proposals underpinning that legislation were clearly to be influenced by the outcome of the Sentencing Review and would take forward matters that were considered as part of that review.

> 25. Accordingly, it cannot plausibly be argued that the process of policy formulation and/or development was complete at the time of the announcement on 1 October 2019. Rather, that announcement was merely a staging-post in the formulation and development of policy which commenced with the initiation of the Sentencing Review and which will not complete until the enactment of legislation.

22. The MOJ pointed out that the policy continued to develop, and a White Paper was issued on 16 September 2020 and even after that proposals might be subject to further consideration and development. The MOJ supported the Commissioner's decision on the application of the public interest test.

23. In response to this the Appellant has replied and states that his argument is that in respect of the specific question addressed by the review 'whether to change the law to keep sexual and violent offenders in prison for a larger proportion of their sentence'. This was in fact settled by 1 October 2019, and he points to the Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order which he says came into force in April 2020, arguing that once this legislation had passed the safe space argument could not apply to this issue. He notes that the White Paper stated:

> We have already legislated so that serious sexual and violent offenders who receive a standard determinate sentence (SDS) of 7 years or more must serve two-thirds of their sentence in prison, with the final third served supervised on licence and subject to recall to prison.

DISCUSSION

24. It is important to note that the Tribunal must consider this appeal at the latest point the request was dealt with by the MOJ, which is the date of the internal review on 25 November 2019.

25. Adopting that approach and considering the case as of that date, in general terms it seems to us that this a classic case for which s35(1)(a) FOIA was designed. Indeed, this kind of policy development and formulation process is that envisaged in paragraph 45 of the Commissioner's guidance (see above) and reflected in the case of *Makin v Information Commissioner* (EA/2010/0080, 5 January 2011), where the First Tier Tribunal considered

a request for information about certain provisions in the Legal Services Bill. It found that policy formulation was ongoing while the bill progressed through Parliament, up until the date it received royal assent:-

> It is clear that the relevant policy was under debate right through to the end of the Parliamentary journey… It is in the nature of the legislative process that provisions remain under review through this process, particularly where they are actively under challenge.

26. As at 25 November 2019, the review document sought by the Appellant had been produced and the government had announced that there would be a sentencing bill. But that was not the end of the process by a long way, especially in a policy area as controversial as criminal sentencing. By 25 November 2019 an election had been called with the uncertainty that that would cause to the development of any policy (including whether it would proceed at all). In the event, the government was returned, but as the MOJ explains, it was not until September 2020 that a White Paper was produced on sentencing issues. The Sentencing Act 2020 received the royal assent on 22 October 2020, over a year after the request was made and, applying *Makin*, the end of the policy formulating process.

27. We should briefly consider the position on 2 October 2019, as it could be said to be unfair to the Appellant if he were put in a worse position because of the wait for the result of the review process. At that date, although an election had not been called, the announcement of the review was still at the very beginning of the policy development process. Even if the government had a strong view about what it wanted to achieve, the development process was bound to continue until the policy came into force through legislation.

28. On that basis we have no difficulty in finding that as of 2 October 2019 or 25 November 2019 the information requested relates to the formulation or development of government policy for the purposes of s35(1)(a) FOIA.

29. The Appellant makes specific points about the change to the law to keep sexual and violent offenders in prison for a larger proportion of their sentence. He says that this

policy was settled as of 1 October 2019 because of the speedy introduction of secondary legislation to bring the policy about. However, he also notes how this secondary legislation was initially stalled and did not take effect until April 2020. It seems to us that the points made by the Appellant actually support the Commissioner's decision in this case because even if there was an intention as at 1 October 2019 (or 25 November 2019) to bring this policy into force, until it was successfully legislated for, then, applying the same principles set out above, the policy was in development or being formulated. Therefore, we do not reach a different conclusion on the application of s35(1)(a) FOIA in relation to this aspect of the formulation of sentencing policy.

30. In relation to the application of the public interest test, arguments against disclosure under section 35(1)(a) FOIA focus on protecting the policymaking process. This reflects the underlying purpose of the exemption. If the information reveals details of policy options and the policy process is still ongoing at the time of the request, safe space arguments may carry significant weight. This seems to us to be very relevant in this case where the request was made at the point of a policy process where a review has been produced which does indeed discuss policy options.

31. We agree with the Commissioner that disclosure of the review document presents 'a significant risk of undermining the confidential space' needed by the MOJ to discuss and formulate policy in this controversial area.

32. We agree with the Commissioner that there is a general public interest in openness and transparency, and that there is a public interest in the issue of sentencing reform, particularly where it relates to public protection. Although it is interesting to know whether the policy adopted by the government is supported by stakeholders consulted, it does not seem to us that there is a great public interest in disclosing the policy document for that reason. It is very likely that in any event the policy formulation process leading to a White Paper and legislation will make it clear the path the government has taken and to which stakeholders it has listened (or not).

33. In our view, the balance of the public interest, when considered, at the latest, at the time of the review on 25 November 2019 is in therefore of protecting the process of policy decision making and in favour of non-disclosure of the information at issue in this appeal. On that basis the appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 7 June 2021

Date Promulgated: 8 June 2021