Case Reference: EA-2022-0051

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: On the papers

Heard on: 5 July 2022
Decision given on: 22 July 2022

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PAUL TAYLOR
TRIBUNAL MEMBER DANIEL PALMER-DUNK

Between

WYNNE JONES

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is allowed.

Substituted Decision Notice:

Organisation: Department of Health and Social Care

Complainant: Mr. Wynne Jones

The Substitute Decision (Original decision notice: IC-73993-M7L8 of 24 May 2021)

1. For the reasons set out below the public authority was not entitled to withhold the requested information under s 35(1)(a) of the Freedom of Information Act 2000 (FOIA).

2. The public authority shall disclose the withheld information (as contained in the closed bundle) to the complainant within 35 days of the date of promulgation of this decision.

3. Any failure to abide by the terms of the tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-73993-M7L8 of 24 May 2021 which held that the information held by the Department of Health and Social Care ('DHSC') was exempt from disclosure on the basis of s 35(1)(a) (formulation and development of government policy) and that the public interest favoured maintaining the exemption. The Commissioner did not require DHSC to take any steps.

Adding DHSC as a party/allowing submissions from DHSC

2. Unusually in this case, the Commissioner did not give DHSC the opportunity to make representations in the course of her investigation. The tribunal decided that it would be appropriate to give DHSC an opportunity to make written submissions or to be joined as a party.

3. An order was issued giving DHSC until 15 July 2022 to indicate if they wished to be joined as a party or to make written submissions.

4. No response was received and therefore this decision was reached on the basis of the information already before the tribunal.

Factual background

5. The request relates to the impact assessment of the decision to make mask wearing compulsory in certain circumstances. Mr. Jones believes that members of the public are at significant risk of harm from Hypoxia (low oxygen in the blood) and Hypercapnia (build up of carbon dioxide in the blood stream) as a result of this policy.

Request

6. On 20 November 2020 Mr Jones made a request for:

> …a copy of the "Impact Assessment" undertaken by DHSC regarding the mandatory requirement for certain members of the public to wear face masks under certain circumstances.

15. DHSC replied on 26 November 2020 refusing to provide the information under s 35(1)(a) (formulation of government Policy).

16. DHSC upheld its decision on internal review on 1 December 2020.

17. Mr Jones referred the matter to the Commissioner on 1 December 2020.

Decision notice

18. In a decision notice dated 24 May 2021 the Commissioner decided that the information was exempt from disclosure under s 35(1)(a) and that the public interest favoured maintaining the exemption.

19. The Commissioner considered that the withheld information related to the development of policy and therefore the exemption was engaged. In relation to the public interest test the Commissioner considered that given the timing of the request and the stage that DHSC was at, at that time, the public interest rested in maintaining the exemption.

Grounds of appeal

20. The Grounds of Appeal are:

    20.1. The Commissioner was wrong to conclude that s 35 was engaged.
        20.1.1. The impact assessment is a finalised public document.
        20.1.2. The Commissioner's definition of 'development' is too wide. Documents should not be held in 'draft' format indefinitely to avoid public scrutiny.
    20.2. The Commissioner was wrong to conclude that the public interest favoured withholding the information:
        20.2.1. Members of the public are at significant risk from Hypoxia and Hypercapnia as a result of government policy. There is compelling scientific evidence of harm. The policy cannot be scrutinised because documentation is withheld. If the assessment is in draft format and subject to review, regulations should not have been imposed without the required risk assessments.

20.2.2. The fact that DHSC has been particularly hit hard by the pandemic does not obviate the need for risk assessment to be undertaken to mitigate the risk of harm to the public.
20.2.3. The statement that 17,555 new infections were recorded is not relevant given the court judgments in Portugal and Germany and that the RT-PCR test should not be used to diagnose viral infection.
20.2.4. The legal proceedings are relevant because they relate to the validity of the RT-PCR test which underpins all covid-related government decisions.
20.2.5. A final decision had been made to mandate the wearing of masks, signed off by ministers and enforced by statute/regulations. The process can no longer be harmed.

The Commissioner's response

15. The Commissioner is not aware and Mr. Jones has not evidenced that the document is already in the public domain. The Commissioner accepts that the document was not in draft form but it still related to the development of policy and accordingly the exemption was engaged.

16. 'Relates to' has a broad meaning. It means that there must be some connection with the information or that the information touches or stands in relation to the development of government policy. The Commissioner maintains that the withheld information has a clear connection to government policy regarding face coverings during the Covid 19 pandemic. The Cabinet Office confirmed that the policy remained under development due to the ongoing nature of the pandemic.

17. When considering the balance of public interest in regard to s 35 the timing of the request will be a particularly relevant factor. The internal review was conducted on 1 December 2020. Accordingly the issue to be determined is whether the Cabinet Office's refusal in November/December 2020 was in accordance with the terms of FOIA. Often in such matters whether policy development was still live will be a key consideration.

18. The Commissioner remains unpersuaded that it was in the public interest to disclose the information at the time of the request in November/December 2020. There were ongoing discussions within government regarding the implementation of measures to address the ongoing pandemic, including matters relating to face coverings. Whilst decisions were made regarding face coverings it is clear that the government kept matters under review and, in the context of the pandemic, the Commissioner maintains that it was in the public interest for the government to have a safe space to consider such matters with relevant experts and develop and implement policy at a pace that enabled the government to mitigate against the impacts of the Covid 19 pandemic.

19. The Commissioner maintains that the legal proceedings referred to by Mr. Jones are irrelevant.

Evidence

20. We read an open and a closed bundle. The closed bundle consists only of the withheld information.

Legal framework

21. The relevant parts of s 1 and 2 of the FOIA provide:

> General right of access to information held by public authorities.
> 1(1) Any person making a request for information to a public authority is entitled—
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.
>
> Effect of the exemptions in Part II.
> .....
> 2(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

S 35(1)(a) FOIA

22. Section 35(1)(a) FOIA provides as follows:

> 35 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,

23. Section 35 is a class-based exemption: prejudice does not need to be established for it to be engaged. It is not an absolute exemption. The Tribunal must consider if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

24. Case law has established in the FOIA context that "relates to" carries a broad meaning (see **APPGER v Information Commissioner and Foreign and Commonwealth Office** [2016] AACR 5 at paragraphs 13-25). In **UCAS v Information Commissioner and Lord Lucas** [2015] AACR 25 at paragraph 46 the Upper Tribunal approved the approach of the FTT in the APPGER case

where it said that "relates to" means that there must be "some connection" with the information or that the information "touches or stands in relation to" the object of the statutory provision.

25. The question of whether the policy-making process is still 'live' is an issue that goes to the assessment of the public interest balancing test, and not to whether the section 35(1)(a) exemption is engaged in the first place (**Morland v Cabinet Office [2018] UKUT 67 (AAC).**

26. The intersection between the timing of the FOIA request and its relevance to the public interest balancing test is helpfully analysed by the First-tier Tribunal in **Department for Education and Skills v Information Commissioner and the Evening Standard (EA/2006/0006)** ("**DFES**") at paragraph 75(iv)-(v) (a decision approved in **Office of government Commerce v Information Commissioner [2008] EWHC 774 (Admin); [2010] QB 98** ("**OGC**") at paragraphs 79 and 100-101):

> (iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.
>
> (v) When the formulation or development of a particular policy is complete for the purposes of (iv) is a question of fact. However, s. 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation. There may be some interval before development. We do not imply by that that any public interest in maintaining the exemption disappears the moment that a minister rises to his or her feet in the House. We repeat – each case must be decided in the light of all the circumstances. As is plain however, we do not regard a "seamless web" approach to policy as a helpful guide to the question whether discussions on formulation are over.

27. The public interest can wax and wane and the need for a safe space changes over time in relation to development of policy.

28. If disclosure is likely to intrude upon the safe space then there will, in general terms, be significant public interest in maintaining the exemption, but this has to be assessed on a case by case basis.

29. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect, in this case the efficient, effective and high-quality formulation and development of government policy (see e.g. para 57 in the FTT decision in **HM Treasury v ICO EA/2007/0001)**.

30. The APPGER case gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out:

> "… when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

The role of the Tribunal

31. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Discussion and conclusions

32. The issues we have to determine under s 35 are:
    32.1. Does the withheld information relate to the formulation or development of government policy?
    32.2. Does the public interest in maintaining the exemption outweigh the public interest in disclosure?

ISSUE 1: Does the withheld information relate to the formulation or development of government policy?

33. We have reviewed the withheld information and we are satisfied that it relates to the development of government policy. We find that the exemption is engaged.

ISSUE 2: Does the public interest in maintaining the exemption outweigh the public interest in disclosure?

34. The relevant date for determining the public interest is at the date of the response to the request. In this case the response was on 26 November 2020.

Public interest in maintaining the exemption

35. Our primary focus when considering the public interest in maintaining the exemption is on the particular interest which the exemption is designed to protect, in this case the efficient, effective and high-quality formulation and development of government policy.

36. The broad timeline of the decisions taken by government in relation to face coverings is as follows:

    11 May 2020 – government advice to wear face coverings in enclosed public spaces

    24 July 2020 – government mandated the wearing of face coverings in shops, supermarkets and transport hubs through the Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 'the Regulations'

    31 July 2020 - Announcement by the Prime Minister that the regulations would be extended to include further indoor public spaces from 8 August 2020.

    22 August 2020 – certain exemptions introduced by way of amendments to the Regulations

    24 September 2020 – extension of the Regulations and increase in fines for failure to comply

    18 July 2021 – The Regulations were revoked by the Health Protection (Coronavirus, Restrictions) (Steps etc.) (England) (Revocation and Amendment) Regulations 2021

    30 November 2021 - government mandated the wearing of face coverings in most indoor public spaces through the Health Protection (Coronavirus, Wearing of Face Coverings) England Regulations 2021.

    27 January 2022 – no longer mandatory to wear a face covering.

37. At the time of the response to the request, the government had implemented the decision to make face coverings mandatory through Regulations. In the particular circumstances of the Covid pandemic we do not accept that this

meant that the development and formulation of policy in relation to the wearing of face coverings was over.

38. In ordinary circumstances, a policy is formulated, announced and superseded in due course. The 'seamless web' approach to policy is not normally a helpful guide to whether discussions on formulation are over. However, whether the formulation or development of a particular policy is complete is a question of fact. The facts in relation to this policy were particularly unusual.

39. The covid pandemic presented the government with a novel and fast changing scenario, in response to which the policy on face coverings and other covid related polices, had to respond rapidly. The fact that an issue had made its way into regulations enforceable by fines was no guarantee that the entire policy would not need to be reconsidered almost immediately. This is reflected in the quantity of guidance, regulations and amendments to regulations that were issued during this period. In these particular circumstances we find that the development and formulation of policy on face coverings was ongoing at the date of the response to the request, although it was not an early stage.

40. We take this into account when considering the weight to be given to the 'safe space' for policy formulation.

41. We have considered the nature of the withheld information and attempted to identify the particular harm to the efficient, effective and high quality formulation and development of government policy that the proposed disclosure would have been likely to cause at the relevant date. We have done this without the benefit of submissions from the DHSC directed either to the harm which would have been caused by the disclosure of specific content, or indeed by disclosure of a document of this particular nature.

42. The DHSC in its response, states that:

> the purpose of the exemption at section 35 is to protect the internal deliberative process as it relates to policy making. In other words, the exemption is intended to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development, including the exploration of all options, the keeping of detailed records and the taking of difficult decisions. Premature disclosure of information protected under section 35 could prejudice good working relationships, the perception of civil servants' neutrality and, ultimately, the quality of government.

43. The assertion of harm is generic and appears to be asserted in relation to any information protected under s 35, rather than in relation to this specific information or information of this particular nature.

44. Having reviewed the withheld information, the tribunal takes the view that there is no specific content in the document which could prejudice good

working relationships, the perception of civil servants' neutrality or the quality of government.

45. Nor does the tribunal consider that releasing a document of that nature, namely an equalities impact assessment, would be likely to have those impacts. Although the tribunal recognises that it is important that those conducting an assessment of this nature draft them with openness and candour, we expect civil servants to be robust and professional. If the civil servants drafting this document had known that it was to be published, we would have expected them to produce the same document.

46. As might be expected of an equalities impact assessment, the withheld document examines the impact of the policy to mandate the wearing of face coverings on people with protected characteristics. The document does not, in our view, contain notably frank or candid discussion of policy options and consequences. The document does not explore 'safe and radical options'.

47. Those features, if present, would increase the importance of the 'safe space' for government to consider policy options out of the public eye, and its weight in the public interest balance.

48. In terms of the actual harm of disclosure of this particular information, we consider that disclosure of these documents at the date of the response to the request would not have been likely to have caused harm to the policy development process. The public and the press were aware that the evidence on transmission and control of Covid was constantly evolving, and it was publicly stated and expected that the requirements imposed on the public were subject to ongoing review and potential change.

49. We do not accept that disclosure of the equalities impact assessment from one stage in the process would have had any impact on the government's ability to change or review its policy or the Regulations at a later stage in the light of emerging scientific evidence and clinical data.

50. For those reasons, although we do place significant weight on the need to maintain a safe space to enable the efficient and efficient, effective and high-quality development of policy we find that the prospects of actual harm to the policy process were relatively low, even though policy development remained live, given the factors set out above.

Public interest in disclosure

51. The Regulations applied to most people, in most indoor public spaces. They applied in places that were difficult to avoid such as in shops, hospitals and on transport. They had a significant impact on the way the vast majority of people carried out their everyday lives. A failure to comply was punishable by a fine.

52. This is a policy with an extremely wide, significant, daily and intrusive impact on almost the entire population. The 'fact-sheet' produced by Mr Jones illustrates just one point of view in the legitimate and, at the relevant time, ongoing public debate about the extent to which the mandatory wearing of face coverings was justified in the light of developing evidence about the risk benefit analysis.

53. Overall we find that there is an extremely strong public interest in transparency and informed scrutiny of the process and decision making behind the government's policies in this area. In our view there is an extremely strong public interest in scrutinising the extent to which the government assessed the impact of the decision on people with protected characteristics. There is also an extremely strong public interest in transparency in knowing what impacts the government had in mind at the time that it made the decision. We find that the equalities impact assessment would have contributed, at the relevant time, to a more informed public debate.

54. Further we accept that there is a general public interest in promoting transparency and openness in the way public authorities operate and a general public interest in transparency of discussions within government.

55. Taking all the above into account, we find that the extremely strong public interest in disclosure outweighs the significant public interest in maintaining the exemption.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 21 July 2022