



NCN: [2024] UKFTT 00473 (GRC)

Case Reference: EA/2023/0047

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: by CVP

Heard on: 6 February 2024
Decision given on: 5 June 2024

Before

TRIBUNAL JUDGE LIZ ORD
TRIBUNAL MEMBER ANNE CHAFER
TRIBUNAL MEMBER NAOMI MATTHEWS

Between

JENNA CORDEROY

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) THE CABINET OFFICE

Respondents

Representation:

For the Appellant: In person

For the First Respondent: Remi Reichold (Counsel)

For the Second Respondent: Cecilia Ivimy (Counsel)

Decision: The appeal is Dismissed

REASONS

Preliminary matters

1. References to sections within our reasons are to the Freedom of Information Act 2000 (FOIA).
2. This is an appeal against the Information Commissioner's (IC) decision notice (DN) IC-70787-J7G1 dated 22 December 2022, which found that the Cabinet Office (CO) was

entitled to withhold information that was exempt under ss.36(2)(b)(i) and (ii) and under section 35(1)(d) for a small amount of other information.

3. The IC decided that the CO failed to correctly apply s.36(2)(c), but that the same information was exempt under ss.36(2)(b)(i) and (ii). The CO no longer relies on s.36(2)(c). However, it now relies on s.35(1)(a), which it had not previously done.
4. In summary, the CO relies on s.35(1)(a) for all of the withheld information, and in addition on s.35(1)(d) for seven short paragraphs in certain emails. In the alternative, it relies on s.36(2)(b)(i) and (ii) in relation to all of the withheld information.
5. The Appellant does not challenge the application of s.35(1)(d) because it was her understanding that the information only extended to a two-sentence paragraph of a private office document.
6. Having reviewed the information, the IC agrees that s.35(1)(d) applies to four of the seven paragraphs, but not to three of them. The IC and the CO agree that, for the three contested paragraphs, s.36(2)(b)(i) and (ii) applies in the alternative.
7. With respect to the s.36(2)(b)(i) and (ii) exemptions, there are two qualified persons' opinions. The first, given in August 2020, is from Chloe Smith MP, the then Minister of State for the Constitution and Devolution. The second, given in June 2023, is from Baroness Neville-Rolfe DBE CMG, Minister of State at the Cabinet Office. The latter was lodged after the appeal was submitted, seeking her opinion in the event section 35(1)(a) was found not to apply, and to cover the narrowed request.
8. The Appellant does not challenge the opinions or the engagement of the s.36(2)(b)(i) and (ii) exemptions. Her appeal is limited to the balance of public interest.
9. The CO advised that some of the information was being withheld under s.40(2)(third party personal data) and that other information was exempt under s.21(1)(information reasonably accessible to the applicant by other means). These sections are not subject to appeal.
10. The IC found that the CO breached s.10(1) in that it failed to provide a valid response to the request within the statutory time frame of 20 working days. This matter is not the subject of appeal.

Background

11. The case involves a request for information contained in Ministerial correspondence that relates to the Information Commissioner's Office (ICO) Report "Outsourcing Oversight? The case for reforming access to information law", which was published in January 2019. The aim of the Report was to make an evidence-based case to extend the reach of FOIA and the Environmental Information Regulations 2004 to include organisations that are not public authorities, but provide a public function.
12. The Government responded by letter dated April 2019 from Chloe Smith MP declining to take forward the recommendations.
13. The Appellant wrote to the CO on 12 March 2020 as follows:

14. “I would like to make a request under the Freedom of Information Act. The request relates to the following letter sent by Chloe Smith in April 2019: http://data.parliament.uk/DepositedPapers/Files/DEP2019-0516/Letter_to_ICO_from_mfC.pdf”

I would like to request the following information:

- (1) From 1st January 2019 to 1st May 2019, please provide all external correspondence and communications between Chloe Smith and the Information Commissioner’s Office (ICO). I would expect this to include correspondence and communications that refer to the ICO’s Report, “Outsourcing Oversight? The case for reforming access to information law”.
 - (2) From 1st January 2019 to 1st May 2019, please provide all internal correspondence and communications held by Chloe Smith that mentions the Information Commissioner’s Office (ICO). I would expect this to include correspondence and communications that refer to the ICO’s Report, “Outsourcing Oversight? The case for reforming access to information law”.
15. The CO declined the request citing the exemptions under ss.35.(1)(d) and 36(2)(b)(i) and (ii) and (c). It also said that some information was withheld under s.40(2) (personal information) and s.21(1) (reasonably accessible by other means).
16. On 8 September 2020, the Appellant requested an internal review, and on 14 October 2020 the CO upheld its decision.
17. On 13 November 2020 the Appellant made a complaint to the IC stating that her complaint was limited to the application of s.35(1)(d) and s.36(2)(b)(i) and (ii). The CO made submissions and provided the IC with the withheld information. She also narrowed her request to information referencing or related to the “Outsourcing Oversight” Report.
18. With regard to ss.35 and 36, the IC decided that these sections had been applied correctly, and that the balance of the public interest favours maintaining the exemptions.
19. On 19 January 2023, the Appellant filed an appeal, which is limited to the issue of the balance of public interest.

Law

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

General right of access to information

21. There is a general duty to disclose information.
22. The relevant parts of section 1 FOIA provide:

- (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.
- (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) [...]
- (4) The information –
- (a) In respect of which the applicant is to be informed under subsection (1)(a), or
 - (b) Which is to be communicated under subsection (1)(b),
- is the information in question held at the time when the request is received, [...]

Effect of exemptions in Part II

23. The general duty to disclose does not arise where the information is exempt.

24. The relevant parts of section 2 of FOIA provide:

- (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 any 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.

Section 35 – Formulation of government policy, etc

25. Section 35 is intended to protect good governance and provide a safe space for government to consider policy options in private.

26. The relevant parts provide:

- (1) Information held by the a government department or by the Welsh Assembly Government is exempt information if it relates to-
- (a) the formulation or development of government policy,
 - ...
 - (d) the operation of any Ministerial private office.

(5) In this section-

“Ministerial private office” means any part of a government department which provides personal administrative support to a Minister of the Crown...”

27. The purpose of s.35(1)(a) is to protect policymaking processes and prevent disclosure which would undermine those processes. The IC’s guidance on s.35 recognises that “[t]here is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms.”
28. The ICO guidance advises that s.35(1)(d) is likely to cover “routine emails, circulation lists, procedures for handling ministerial papers or prioritising issues, travel expenses, information about staffing, the minister’s diary, and any purely internal documents or discussions which have not been circulated outside the private office.”

Section 36 – Prejudice to effective conduct of public affairs

29. Section 36 can only be relied upon in relation to information to which s.35 does not apply.

30. The relevant sections provide:

(1) This section applies to-

- (a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

...

(b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) Would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(5) ...”qualified person”-

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.

31. Therefore, in this case, the “reasonable opinion” of the Minister is required.

Caselaw and guidance on s.36 prejudice

32. The qualified person’s opinion only extends to whether disclosure would have, or would be likely to have, any of the prejudicial effects in s.36(2). The qualified person is not required to consider the public interest for and against disclosure. The Tribunal should not substitute its own view on the prejudicial effects – **IC v Malnick & Advisory Committee on Business Appointments** [2018] UKUT 72 (ACC).

33. The Upper Tribunal recognised in **Malnick** at §29 that: “...although the opinion of the qualified person is not conclusive as to prejudice ..., it is to be afforded a measure of respect.”
34. The Tribunal’s judgment on the public interest in maintaining the exemption may, in part, be informed by the qualified person’s opinion as to the prejudice that would, or would be likely to be caused by disclosure – **DWP IC & Zola** [2016] EWCA Civ 758, at §55.
35. In considering prejudice, the Court of Appeal in **Zola** at §27 accepted that the First Tier Tribunal judgment in **Hogan v IC** [2011] 1 Info LR 588 comprised “an accurate statement of the correct approach to the issue of prejudice” when it stated that there must be a real and significant risk that disclosing the information would cause prejudice that was real, actual or of substance.
36. The IC and the Tribunal must also assess whether the qualified person’s opinion was reasonable. The test is similar to “Wednesbury” unreasonableness – **Guardian Newspapers & Brooke v IC & BBC** (EA/2006/0011 & 0013), 8 January 2007. It relates to whether it was substantively reasonable, as opposed to procedurally reasonable – **Malnick** at §56.
37. The ICO guidance on s.36 advises that: “...these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchange views.”

Caselaw on public interest balance

38. With respect to the public interest balancing exercise, in **APPGER v ICO** [2013] UKUT 0560 (ACC) the Upper Tribunal provided guidance on how it should be done:
 75. [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 [...]
 76. Such an approach requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice and (b) benefits that the proposed disclosure of the material in respect of which the [...] exemption is claimed would (or would be likely to or may) cause or promote. Plainly that includes an identification of the relevant material and the circumstances in which it was provided to or obtained by the body claiming the [...] exemption.
39. It is well established that there is a strong public interest in maintaining a safe space to discuss issues which are “live”, i.e. which continue to be the subject of active consideration – **Cabinet Office v Information Commissioner & Morland** [2018] UKUT 67, §31.
40. The public interest in maintaining a safe space and preventing a chilling effect does not cease once a decision is taken: the strength of the public interest in any given case will turn on all the circumstances, and is a question of fact and degree – **Department of Health and Social Care v Information Commissioner** [2020] UKUT 299, §24.

Issues

41. The crux of the appeal concerns the balance of the public interest. The issues for the Tribunal are:

1. whether all or any of the requested information falls within s.35(1)(a) in that it relates to the formulation or development of government policy; and if so,

whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

2. whether any of the seven short email paragraphs referred to in the preliminary matters above fall within s.35(1)(d) in that they contain information that relates to the operation of any Ministerial private office; and, if so,

whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

3. In the alternative, whether any or all of the requested information falls within s.36(2)(b) (i) or (ii) in that, in the reasonable opinion of the Ministers (the qualified persons), disclosure would, or would be likely to, inhibit either the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation; and, if so,

whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Submissions

Appellant's submissions

42. The Appellant argues that the DN was not in accordance with the law and the public interest favours disclosure. She says the IC did not properly afford due weight to the public interest factors in favour of disclosure, and she puts forward the following public interest arguments:
43. The Appellant notes that the ICO's Report was a topic that attracted much coverage, with numerous stakeholders calling for FOIA to be extended. However, the Government's response was brief and only a couple of paragraphs was dedicated to freedom of information. Therefore, there is a legitimate and significant public interest in seeing to what extent the Government considered and deliberated over the Report's recommendations.
44. In referring to the Grenfell Tower tragedy and the collapse of Carillion, she states that she is not confident that the Government truly gave thought to the ICO's recommendations or deliberated them in depth. Disclosure would allow the public to see whether events like this were discussed, and to examine what evidence the CO relied upon. This would help the public understand whether the CO overlooked any research that undermined the Government's stance that measures have already been put in place to increase transparency of contracts and tenders.
45. Disclosure would allow the public to see whether Chloe Smith considered the ICO's proposals on how a balance could be struck between the need to increase transparency and the need to avoid burdening smaller organisations. It could also lead to better decision making.
46. She opined that the Government did not have any appetite to improve, extend and strengthen freedom of information legislation and therefore it was even more in the public interest that

the information be disclosed. As the government will not extend FOIA and it is not on the agenda, it is not a live issue, and disclosure will not have an impact on future collective decision making or disrupt safe space.

47. Disclosure would help build upon campaigners' and researchers' work on freedom of information policy, and would spark discussions on this and where the CO stands on freedom of information and transparency.

CO's submissions

Engagement

48. The CO submits that the qualified persons' opinions with respect to s.36(2)(b) are clearly reasonable and there is no proper basis for the Tribunal to take a contrary view.
49. With respect to s.35(1)(a) it states that the ICO Report recommended widening the scope of information rights legislation, and whilst the Government did not agree, it did commit to reporting to Parliament on the coverage of FOIA every two years. This may relate to policy development, in the sense that it concerns a review and adjustment of existing policy.
50. As for engagement of s.35(1)(d), the CO says that the limited information to which it applies relates to the operation of the Minister's private office, and there is no significant substantive discussion of the ICO Report.

Public interest balance

51. The CO's case is that the public interest weighs in favour of maintaining each of the exemptions.
52. It accepts that the extension of information rights legislation is a topic of public importance and acknowledges that there is a general public interest in knowing how ministerial private offices operate. It does not dispute that disclosure might build confidence and trust in how ministers are supported and how ministerial decisions and requests for advice are communicated. It could also reassure the public that the Government is committed to greater transparency.
53. The Government has recognised this public interest by publishing its reasoned response to the ICO Report. The Report was not the first time Government had considered the extension of freedom of information legislation and, at the time of the request in March 2020, the topic continued to be debated and actively considered by Government.
54. Consequently, at the time of the Report, there was substantial information in the public domain which explained the Government's reasons for its response to the Report. No inference of lack of care and attention can be drawn from the length of the response. The disputed information does not throw significant further light on this reasoning and specifically does not shed light on the Minister's thinking on Carillion, Grenfell Tower, or avoiding burdens on smaller organisations. There is much more limited public interest in disclosure than the Appellant contends.
55. Disclosure would not assist in examining the quality of evidence, research and deliberations on the issues raised in the Report. The disputed information does not contain a complete account of the Government's evidence or research on the topics raised.

56. There is substantial public interest in maintaining the relevant exemptions.
57. Ministers and senior officials need to be able to exchange views openly and to receive free and frank advice without inhibitions. Ministerial private offices need a safe space to focus on managing the ministers' work efficiently without fear that early thinking may be disclosed. It is of particular importance that the Government be given time and space to consider reports and recommendations by regulators, and the burdens of any new legislation on private entities. Premature disclosure of deliberations is highly likely to be distracting and to lead to less frank and robust advice and discussion.

58. The Minister's letter in response to the Report explained that any changes in legislation would require careful and detailed consideration, and she committed to reporting on the coverage of the legislation every two years. Whilst the Government has not to date introduced legislation, this does not mean that it had closed its mind to the issue. At the time of the request and response, it was likely that the issue would recur and require consideration in the near future. Therefore, the issues raised were very much live and ongoing.

IC's submissions

Engagement of s.35(1)(a)

59. In the government's response letter to the ICO Report, Chloe Smith MP noted that the IC's recommendations would require legislation and she did not agree that a review of provisions was necessary at that time. In a question during a Parliamentary debate, she stated that: "... we have no plans at present to legislate further in this area."
60. As the Government did not decide to implement the ICO's recommendations, the IC does not accept that s.35(1)(a) is engaged.

Engagement of s.35(1)(d)

61. In relation to four of the seven short paragraphs claimed by the CO to fall within this section, the IC is satisfied that they are administrative in nature and do not contain substantive discussion of the relevant issues. However, with respect to the remaining three paragraphs, the IC is of the opinion that they are not administrative and are more of substance, so that they fall outside the section.

Balance of public interest (s.35(1)(d))

62. Significant weight should be given to the argument that there needs to be a safe space to manage ministers' work diaries and commitments. In contrast, the weight to be given to the small amount of information withheld under this section, in terms of what it adds to transparency and accountability of the Government's response to the ICO Report, is minimal. It would add little, if anything, to the public's understanding and public debate. The balance favours maintaining the exemption.

Engagement of s.36(2)(b)(i) and (ii)

63. The IC submits that the opinions of the qualified persons are substantively reasonable. Therefore, the section is engaged.

Balance of public interest (s.36(2)(b)(i) and (ii))

64. The IC acknowledged the high-profile events referred to by the Appellant (Grenfell Tower and Carillion) and the significant and substantial public interest, weight and value in transparency and accountability, which cannot be understated.
65. However, the Government's response letter provided insight and information as to the Government's views on, and response to, the ICO Report. This provided some transparency and accountability of the Government's decision not to extend freedom of information legislation to private contractors/companies delivering public services.
66. The IC accepted the strong and well-established public interest in protecting and preserving the safe space for ministers and senior officials to exchange views, and for ministers to receive free and frank advice from officials. Whilst the request was made a year after the Government's response to the ICO Report, the extension of freedom of information legislation still remained a live issue at the time of the request, giving rise to the need for a safe space.
67. In the IC's view, disclosure would be likely to have a detrimental effect on the process by which officials provide advice in the future. He remains satisfied that the balance of public interest falls in favour of maintaining the exemption, albeit by a narrow margin.

Discussion and conclusions

Engagement of s.35(1)(a)

68. Chloe Smith made it clear that the Government had no plans to legislate on the ICO Report recommendations. Therefore, considering the matter at the time of the CO's response to the request, we find that the information does not relate to the formulation or development of Government policy and s.35(1)(a) does not apply.

Engagement of s.35(1)(d)

69. We have considered all seven paragraphs individually.
70. With respect to the four paragraphs agreed by the IC to fall within the section, we are satisfied that they are administrative in nature and do not contain substantive discussion of the relevant issues. Therefore, we find that they relate to the operation of the Minister's private office and that s.35(1)(d) is engaged.
71. As for the remaining three paragraphs, in our judgment, they are substantive in nature. Therefore, we find that they do not relate to the operation of the Minister's private office and that s.35(1)(d) is not engaged.

Public interest balance for s.35(1)(d) information

72. The small amount of information withheld under this section would add almost nothing to the public's understanding and debate around the ICO Report. Neither would it add to Government transparency or accountability.
73. In contrast, we give significant weight to the argument that there needs to be a safe space to manage the Minister's work.

74. Therefore, we find that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Engagement of s.36(2)(b)(i) and (ii)

75. There is no challenge to the Minister's opinions that s.36(2)(i) and (ii) are engaged. We have considered both opinions and we are satisfied that they are reasonable. Accordingly, all the requested information, apart from the four short paragraphs covered by s.35(1)(d), fall within s.36(2)(b)(i) and (ii).

Public interest balance for s.36(2)(b)(i) and (ii) information

76. We accept that the extension of information rights is one of considerable public interest, particularly in light of high profile events such as Grenfell and Carillion. We also acknowledge that the Report attracted significant coverage and that there is public interest in transparency and accountability.

77. However, whilst the Government's response to the Report was brief, it set out the Government's views on why it was not prepared to extend freedom of information legislation at that time. The requested information does not provide any further significant detail to what is already in the public domain.

78. There is substantial public interest in protecting a safe space in which ministers' and senior officials' views can be freely and frankly exchanged, without concerns that their early thinking might be subject to disclosure. At the time of the CO's response, the issue of any future extension to the legislation was still a live matter, requiring a safe space. Disclosure would be likely to have an inhibiting effect on discussions going forward and be detrimental to the robustness of internal debate. We give this significant weight.

79. Balancing the competing arguments, we find that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Summary of decision

80. For the above reasons, we conclude that the CO was entitled to withhold the requested information under s.36(2)(b)(i) and (ii), and for a small amount of information, under s.35(1)(d).

Signed Judge Liz Ord

Date: 5 June 2024