FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Appeal Reference: EA/2015/0136

Decided without a hearing
At Field House
On 19 April 2016
Promulgation Date 27th May 2016

Before

JUDGE PETER LANE
ROSALIND TATAM
MARION SAUNDERS

Between

CHRISTOPHER LAMB

Appellant

and

INFORMATION COMMISSIONER

First Respondent

CABINET OFFICE

Second Respondent

DECISION AND REASONS

The Chilcot Inquiry

1. On 15th June 2009, Prime Minister Gordon Brown announced the establishment of an inquiry into matters relating to the invasion of Iraq in 2003 and the issues raised by the

subsequent occupation and state-building of that country. The Prime Minister said that the inquiry would be in the nature of a Privy Council committee of inquiry. It would be "independent of government" and, in order for it to be as objective and non-partial as possible:

> "the membership of the committee will consist entirely of non-partisan public figures acknowledged to be experts and leaders in their field. There will be no representatives of political parties from either side of the house."

The inquiry was set up on this basis. It is headed by Sir John Chilcot and is, accordingly, generally referred to as the Chilcot Inquiry. We shall refer to it as such in this decision.

2. Some five years after the establishment of the Chilcot Inquiry, the appellant wrote to the Cabinet Office in the following terms:-

> "Under the terms of the FoI Act 2000, I request disclosure of all information held by the Cabinet Office relating to how the selection criteria used in recruiting the individual members of the Iraq Inquiry Panel was decided upon. This should include information in electronic and paper form appertaining to the choice of a Privy Council led 'lessons for government Inquiry rather than any other type of Inquiry and the criteria governing the selection of the four privy councillor members chosen.'"

3. The Cabinet Office replied on 22nd August 2014 to confirm that it held the relevant information but considered it to be exempt from disclosure by reason of section 35(1)(a) of FOIA:-

> "**Formulation of government policy, etc.**
>
> 35(1) Information held by a government Department ... is exempt information if it relates to -
>
> (a) the formulation or development of government policy".

4. The exemption in section 35(1)(a) is in the nature of a qualified exception. This means that the information is exempt from disclosure if "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information" (section 2(2)(b)).

The Commissioner's decision notice

5. The Commissioner's decision notice of 8th June 2015 concluded that the information in question was information relating to the formulation or development of government policy and, thus, within section 35(1)(a). Since section 35 was a "class-based exemption," there was no need for the public authority to demonstrate prejudice in order to invoke the exemption. On the facts, the Commissioner concluded that the information related to the formulation or development of government policy because the final decision on the

composition of the inquiry was to be made either by the Cabinet or by a relevant minister; the government intended to achieve a particular outcome or change in the real world; and the consequences of the decision would be wide-ranging. The Commissioner's decision was taken on the basis of having seen the withheld information.

6. The Commissioner accordingly turned to the issue of the public interest. In favour of disclosure, he acknowledged the general public interest in open government and in the transparency that this engendered which, in turn, could contribute to a greater understanding of, and participation in, public affairs. In particular, the Commissioner considered that there was a strong public interest in understanding how the government developed its policies on establishing the Chilcot Inquiry and that there was also a strong public interest in an independent, a full and frank inquiry. The Commissioner, however, believed that these "will be met when the Inquiry's report is published."

7. The Commissioner noted the appellant's contention that one aim of the Inquiry - to enable "lessons to be learned" for future international interventions - had been undermined by the length of time the Inquiry had, in the event, taken. During that period, there had, for example, been UK intervention in Libya in 2011. The appellant accordingly contended that disclosure of the withheld information would help to understand, in effect, why the Inquiry had been unable to provide suitable "lessons" that might have been useful in the years following 2010.

8. The appellant also contended that it was important for the public to be aware of how the selection process for members of the Inquiry had taken place, so that the public could be ensured that impartiality and independence had been strictly observed. There was also a public interest, according to the appellant, in the disclosure of information regarding the remit of the Inquiry.

9. Finally, the appellant considered there was a public interest in disclosing information that revealed why a decision had been taken not to employ legal counsel for the Inquiry or to include a practising lawyer on the panel. The failure to make provision for such a person was, according to the appellant, a liability for the Inquiry.

10. In balancing the public interest arguments, the Commissioner had regard to the fact that, in attributing weight to the "chilling effect" of disclosure upon future behaviour, the Commissioner recognised that civil servants were expected to be impartial and robust when giving advice and not be easily deterred from expressing their views by the possibility of future disclosure. Nevertheless, the Commissioner accepted that "chilling effect" considerations would still carry some weight in most section 35 cases, and would be likely to be of significant weight in the case of ongoing policy discussions; that is to say, where at the time of refusal the relevant policy had not crystallised.

11. In this respect, the Commissioner disagreed with the Cabinet Office, which argued that the policy in question must be regarded as ongoing, because the Chilcot Inquiry had still to report. The Commissioner drew a distinction between the currency of the Inquiry and the process leading to its establishment.

12. However, the Commissioner concluded that the balance of public interest still weighed in favour of withholding the information. Disclosure would, in the circumstances:

> "be very likely to result in a significant and notable chilling effect on the way in which officials advise Ministers on matters of similar importance in the future. This is because the information … comprises a detailed and candid examination of the various issues and options associated with the establishment of the Inquiry. Consequently in the Commissioner's opinion disclosure of this information would be very likely to have an adverse effect on the way in which the officials advise Ministers in other such high profile matters. In the circumstances of this case, the Commissioner believes that the chilling effect arguments attract particular weight given the high profile and potentially controversial nature of the subject matter and the level at which such advice was provided and discussed, being the highest level in government."

13. The Commissioner also considered that there was some merit in the Cabinet Office's argument "that disclosure of the withheld information could undermine the Inquiry itself." Details of this reasoning could not be given without revealing the content of the withheld information. Nevertheless, the Commissioner considered that disclosure would result in "inevitable public discussion of its content which would distract from the Inquiry to a significant degree."

14. This view was reached, having taken into account the matters raised by the appellant (as he now is), regarding the public interest in disclosure.

Appeal, response and reply

15. The appellant appealed to the First-tier Tribunal. Each party was content for the appeal to be decided without a hearing and we are satisfied that we can justly do so.

16. In its response to the notice of appeal, the Cabinet Office pointed to the judgment of Charles J in Department of Health v IC and Lewis [2015] UKUT 0159 (AAC), in which the Upper Tribunal criticised the "class approach" as having spawned "arid, and in my view incorrect, approach or analysis by reference to whether a particular exemption carries inherent or presumptive weight" [21]. What was needed instead was a concentration upon actual benefit and actual harm.

17. The Cabinet Office disagreed with the Commissioner regarding the issue of whether the "government policy" in question was live and ongoing at the time of the refusal decision. The Cabinet Office contended that it was ongoing because the Inquiry "has yet to deliver its report." There was a risk that the information sought would risk undermining the Inquiry. Given that the information "comprised a detailed and candid examination of the various options and issues around the formulation of the Inquiry" the Cabinet Office agreed with the Commissioner that the disclosure "would be likely to have an adverse impact."

18. In his reply, the appellant found himself broadly "in agreement with the Cabinet Office submissions on the weighing of public benefits of disclosure against harm caused", in deciding whether the balance favoured disclosure, rather than adopting a "class approach to the public interest test in valuing the 'disputed information.'" The appellant noted that the Commissioner attributed only "some merit" to the Cabinet Office's argument that disclosure could undermine the operation of the Chilcot Inquiry. He asked the Tribunal, in revisiting the balancing exercise, to consider what was the nature of the harm and whether it warranted the claim that disclosure would produce a significant and notable chilling effect.

19. The appellant questioned whether it was unreasonable to think that the advice needed to set up the Inquiry would be impartial, objective and demonstrate the integrity associated with the ethics of the Civil Service code. If the information was of this nature, then it was difficult to see why it should be "potentially controversial." If, on the other hand, the information showed something "less than impartiality, objectivity and integrity," then the appellant argued there was a strong argument that, notwithstanding the chilling effect, there was a greater public benefit in disclosing the information "because it would reveal evidence of weaknesses and flaws in policy formulation, preventing policy from being of the very highest standard."

Discussion

20. In reaching our decision (which is unanimous) we have had regard to all the material in the open bundle of documents. We have also considered the closed material, comprising the disputed information and the submissions made in respect of it. We have produced a Closed Annex to this decision, in which we are able to go into more detail concerning the disputed information and the issue of the balance of the public interest.

21. We are fully satisfied that the withheld information falls within section 35(1)(a). The information was brought into being in order to assist the formulation of government policy, concerning the investigation of various matters leading up to and following the invasion of Iraq in 2003. The policy was being formulated at the highest level in central government, with official advice emanating from a corresponding level of the Civil Service.

22. Information relating to the formulation of government policy does not lose its character as such, with the passage of time. The actual harm that might ensue from disclosing such information, whilst the policy in question is still inchoate, is likely to be considerable. Disclosure at such a stage is, in general, likely to have a "chilling effect" upon those responsible for finalising the policy. But although the information in question remains covered by section 35(1)(a), arguments relying upon the alleged "chilling effect" of disclosure are, in general, likely to be of lesser force, once the relevant policy has crystallised. At this point, the issue will be whether officials are likely to behave as fearlessly and frankly as is required in the public interest, in the course of formulating

some other, future policy, because the Commissioner, a tribunal or a court has ordered disclosure of information regarding the formulation of the relevant policy.

23. Like the Commissioner, the Tribunal is entirely unpersuaded by the Cabinet Office's submission that, in the present case, the policy regarding the composition of the Chilcot Inquiry must be regarded as still in the process of formulation or development, because (as at 2014, when refusal occurred) the Inquiry had not issued its report (and has still not done so). On any sensible view, the policy was finalised when the Prime Minister made his announcement to the House of Commons in June 2009. By 2014, the Inquiry had been at work for some five years. There is no evidence whatsoever, whether "open" or "closed," to suggest that, by that point, the government might have decided to re-constitute the Inquiry panel's membership, so as to make provision for it to be something other than a privy councillor-led body.

24. The Cabinet Office's assertion that disclosure of the relevant information would "risk undermining the Inquiry" is, we consider, a matter that goes to the overall assessment of the public interest. It is not a reason for concluding that the relevant policy is still in the process of formulation or development. (We accordingly deal with this assertion at paragraph 30 below.)

25. We turn to the respondents' contentions regarding the likely "chilling effect" of disclosing the information in respect of what (in 2014) was already a crystallised policy. The reason given by the Commissioner for concluding that the public interest in withholding the information is still to be regarded as significant is because it "comprises a detailed and candid examination of the various issues and options associated with the establishment of the Inquiry." As can be seen from the end of the quoted passage in paragraph 12 above, the chilling effect is said to be particularly weighty where the matter is controversial and the advice is given and received at the highest levels.

26. We are entirely unpersuaded by this rationale. Taken to its logical conclusion, it would turn the qualified exemption which Parliament has seen fit to impose in respect of section 35(1) into what would, in practice, be very close to an absolute exemption in the case of advice given to the Prime Minister. By virtue of his or her office, the Prime Minister is likely to be predominantly occupied with "high profile and potentially controversial matters."

27. The Commissioner's stance also carries the highly problematic implication that, the more senior the level of official advisor concerned, the greater the risk that disclosure would have an adverse effect upon that (or some comparable) advisor's likely future behaviour. It is, however, precisely at the highest levels of the Civil Service that the public expects to find the highest standards of official behaviour, including robustness in giving a Prime Minister the best possible advice, candid though it may need to be.

28. It is also at this level that officials can most be expected to have regard to the point recently made by Charles J in Lewis; namely, that public authorities operating within the

realm of qualified (as opposed to absolute) exemptions in FOIA will be aware that any information they produce is potentially liable to disclosure.

29. Having examined the withheld information, we are frankly at a loss to see how its disclosure would be remotely likely to have any relevant "chilling effect" on future advice at this level of seniority and importance. We have more to say about this in the Closed Annex. We are in no doubt that any reasonable person, reading the information, will conclude that it comprises precisely the kind of high-quality and frank advice, which the public would expect the Prime Minister to be given. The suggestion that the disclosure of this information would cause the same (or future) public officials to behave differently is, at best, fanciful.

30. Both of the respondents contend that disclosure of the information could undermine the Chilcot Inquiry. Having examined the disputed information and considered the closed submissions, the Tribunal is equally at a loss to understand this contention. We have seen nothing in "open" or "closed" that begins to suggest that the Chilcot Inquiry panel might be precluded or impeded (or would have been in 2014) from finishing their report if information were revealed about the thinking behind the government's decision to appoint the kind of panel it did. Any public discussion of the withheld material is, we find, highly unlikely to affect the panel's deliberations. Indeed, any public interest concerning the Chilcot Inquiry is far more likely to involve a wish to see the panel publish its report as soon as practicable.

31. Set against these weak overall arguments in favour of withholding the material, the public interest in disclosure is, we find, far weightier. The interest generated in the Chilcot Inquiry, including the reasons why its report remains unpublished, is such that there is a very strong public interest in understanding how the Inquiry came to be created and why a privy councillor-led panel was chosen. More widely, there is a public interest in facilitating informed discussion about how future inquiries into future events might be constituted.

Decision

32. This appeal is allowed. We substitute a decision notice requiring the disclosure of the withheld information within 14 days of the date of this decision.

Judge Peter Lane
20 May 2016