



**Appeal number: EA/2017/0045**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**JUDITH KIDD**

**Applicant**

**- and -**

**THE INFORMATION COMMISSIONER  
THE CABINET OFFICE**

**Respondents**

**Before:  
Judge Alison McKenna  
Dr Henry Fitzhugh  
Mr Andrew Whetnall**

**Sitting in public at Fleetbank House on 15 August 2018**

**The Appellant was represented by Jack Mitchell, counsel.  
The Cabinet Office was represented by Neil Sheldon, counsel.  
The Information Commissioner did not appear.**

## DECISION

1. The appeal is allowed.
2. The Information Commissioner's Decision Notice dated 16 February 2017 is hereby set aside and substituted by a Decision Notice to the effect that the Cabinet Office was entitled to refuse to disclose the information requested by the Appellant in reliance upon s. 31 (1) (c) of the Freedom of Information Act 2000.
3. The Cabinet Office is not required to take any steps.

## REASONS

### *A: Background to Appeal*

4. This appeal concerns the Appellant's request for information about the charity "Kids Company", which received £43 million in grant funding from Government but was placed into voluntary liquidation in August 2015.
5. The Appellant made a request to the Cabinet Office on 1 March 2016 in the following terms:

*"Keeping Kids Company Co No 03442083 in liquidation 5390/2515 (Company)*

*I am writing to make an open government request for all the information to which I am entitled under the Freedom of Information Act 2000.....*

*Please send me:*

1. *A copy of the grant which Government made in July 2015 to the Company (Grant);*
2. *Correspondence between Insolvency Service, Company and Cabinet Office concerning repayment and denial of repayment of the Grant and the award of the Grant;*
3. *Correspondence between Cabinet Office Company [sic] and Insolvency Service concerning attempt to obtain repayment of the Grant;*
4. *Correspondence by Cabinet Office with staff of the Company including Camila Batmanghelidjh, the Trustees whether collectively or individually and advisers on their behalves."*

6. At the time of the request, investigations by the Official Receiver and Charity Commission had been commenced but the Official Receiver's investigation had been agreed between them to take precedence. The Cabinet Office confirmed that it held information relating to the Official Receiver's investigation.
7. The Cabinet Office initially refused to disclose the information it held in reliance upon s. sections 43 (2) and 41 (1) of the Freedom of Information Act 2000 ("FOIA"). It upheld

its initial refusal on internal review on 6 September 2016, seeking additionally to rely on 31 (1) (g) FOIA.

8. The Information Commissioner issued Decision Notice FS50629523 on 16 February 2017, upholding the Cabinet Office's reliance on s. 31 (1) (g) FOIA on the basis that disclosure was likely to prejudice the Official Receiver's investigation. The Information Commissioner concluded that the public interest favoured maintaining the exemption. The Information Commissioner did not determine the engagement of the other exemptions which had been raised by the Cabinet Office. No steps were required to be taken.

9. The Appellant appealed to the Tribunal.

*B: Appeal to the Tribunal*

10. The Appellant's Notice of Appeal dated 15 March 2017 relied on a single ground of appeal that "*The settlement has been effected. Therefore the grounds that you have put forward (paragraphs 22-37 ICO decision document) are no longer valid*".

11. The Information Commissioner's Response dated 18 April 2017 maintained the analysis as set out in the Decision Notice and submitted that the grounds of appeal were misconceived because the public interest must be considered as at the date of the Cabinet Office's decision, so subsequent events could not be taken into account on appeal.

12. The Cabinet Office's Response dated 9 May 2017 also supported the analysis as set out in the Decision Notice. It was submitted that the Appellant's grounds of appeal had failed to engage with the substance of the Decision Notice and explain why it was said to be wrong in law. The Cabinet Office sought to rely on the evidence of Mark Fisher, which was appended to its Response, to explain to the Tribunal the likely prejudice to the Official Receiver of disclosure at the relevant time and its view as to the public interest balance. "*To the extent necessary*" the Cabinet Office also sought to rely on exemptions under s. 40, 41 and 43 FOIA.

13. The Appellant's Reply (termed *Submissions in Response to Mark Fisher's Statement*) dated 30 May 2017 emphasised that the Appellant did not accept the witness evidence relied upon by the Cabinet Office. Having originally consented to a determination on the papers, the Appellant requested an oral hearing so that she could challenge Mr Fisher's evidence.

14. The appeal was initially listed for hearing on 15 February 2018 but was adjourned because (i) the Appellant's counsel had no hearing bundle and (ii) he placed before the Tribunal a "speaking note" (produced only on the day of the hearing and so in breach of the Tribunal's Directions about skeleton arguments) an issue which had not previously been addressed in the pleadings but which, in the Tribunal's view, required determination. The Tribunal provided the Appellant's counsel with a copy of the open bundle and directed the other parties to respond to the new issue in writing before the hearing re-convened.

15. The Tribunal sat again on 15 August 2018 with written submissions having been received from all parties. It heard oral evidence and oral submissions. This is our reserved Decision.

16. The Tribunal considered an agreed open bundle of evidence comprising some 200 pages. A Supplemental open bundle was produced for the August hearing. We also considered a substantial (but un-paginated) closed bundle, containing the withheld information itself and other documents which were revelatory of it. The closed bundle was subject to a rule 14 (6) direction made by the Chamber's Registrar.

17. The Appellant and her representatives were asked to leave the hearing room while the Tribunal heard brief closed submissions from the Cabinet Office's counsel. Following closed submissions, the Tribunal gave the Appellant's counsel a written "gist" of the matters it had considered in his absence, following the guidance of the Court of Appeal in *Browning v IC* [2014] EWCA Civ 1050.

*C: The Law*

18. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

*"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."*

19. The principal exemption relied upon in this case is s. 31 (1) (c) FOIA which provides as follows:

*"Law Enforcement*

*Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –...*

*(c) the administration of justice".*

20. This is a so-called qualified exemption, giving rise to the public interest balancing exercise required by s. 2 (2) (b). The public interest falls to be assessed as at the date of the public authority's decision i.e. in this case, the date of its internal review.

21. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

*"If on an appeal under section 57 the Tribunal considers -*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”*

22. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

*D: Submissions*

23. The new argument raised by the Appellant’s counsel for the first time at the 15 February hearing was as follows:

“Section 31 (1) (g) of FOIA refers to *“the exercise by any public authority of its functions....”*”.

Section 3 of FOIA defines *“Public Authority”*.

It appears to be common ground in this case that the Official Receiver is not a *“public authority”* for the purposes of FOIA, as it is not listed in schedule 1 FOIA.

It is not explained in the Decision Notice why the Information Commission concluded that s. 31 (1) (g) was engaged by the Official Receiver’s functions if it is not a public authority within the meaning given to that term in s. 3 FOIA. This is an error of law.”

24. The subsequent exchange of written submissions resulted in a unanimous view that the Appellant’s counsel had been correct to submit that s. 31 (1) (g) FOIA was not engaged, because the Official Receiver’s Office is not a public authority for the purposes of FOIA. However, the Cabinet Office then sought to rely on s. 31 (1) (c) FOIA in the alternative. The Registrar on 3 May 2018 permitted its late reliance on the alternative exemption in view of the fact that the Appellant had not raised its argument in the Notice of Appeal. The Appellant did not apply for a rule 4 (3) reconsideration of the Registrar’s Direction, although Mr Mitchell asked the Tribunal to disallow the Cabinet Office’s late reliance on s. 31 (1) (c) at the hearing.

25. In his oral submissions, Mr Mitchell conceded that the Official Receiver continued to be involved in this case, but submitted that as the matter had now moved on to the Directors Disqualification Proceedings, the Tribunal should consider the likely prejudice to the Official Receiver’s investigation, which had now concluded, to be lessened. He noted that one of the Directors had given an undertaking to the Official receiver but that the others were contesting their proposed disqualification. He submitted that notwithstanding these

live proceedings, the public interest in disclosure outweighed the public interest in maintaining the exemption. He referred the Tribunal to the standard terms and conditions for grants to charities, which referred to considerations of transparency.

26. The Cabinet Office very helpfully produced for the closed bundle a schedule of documents with a table showing which of the claimed exemptions were said to apply to each. Mr Sheldon submitted that the s. 31 (1) (c) exemption applied to the entirety of the withheld information so that, if the Tribunal were satisfied that it was engaged, it would not be necessary to consider the other exemptions relied on in relation to some of the documents only. Mr Sheldon reminded the Tribunal that the public interest balancing exercise should be undertaken in consideration of the facts as they stood at the time of the Cabinet Office's internal review in September 2016. The Tribunal had before it correspondence from the Official Receiver's Office (which had not been challenged by the Appellant) showing that, in October 2016, the Official Receiver was about to conduct interviews with the Directors. He submitted that the disclosure to the public at large under FOIA of the information requested by the Appellant would have been likely to affect the candid co-operation of the Official Receiver's interviewees.

27. As to the public interest, Mr Sheldon submitted that the Official Receiver is an officer of the court who was engaged in a sensitive investigation at the time of the request and internal review and continues to be engaged in legal proceedings. He noted that the exemption relied on was intended to be temporary in application and that there would doubtless come a time when the information sought would not be prejudicial to the administration of justice. He submitted that the public interest lay in ensuring that the circumstances surrounding the collapse of the charity were properly investigated and that fair process was observed in bringing the matter to court for determination. Putting information into the public domain in September 2016 would, in his submission, have been likely to have affected the fairness of the investigation and proceedings, for example by inhibiting witnesses from coming forward. He acknowledged that the Appellant and others had a genuine interest in seeking to uncover what had gone wrong, but submitted that there was already much information in the public domain, it was anticipated that the Directors Disqualification Proceedings would be heard in public, and that the Appellant had not demonstrated why the public interest in the particular information she had requested should outweigh the wider public interest in safeguarding the proper administration of justice.

28. In her final submissions dated 23 July 2018, the Information Commissioner accepted that the Decision Notice was wrong in concluding that s. 31 (1) (g) FOIA was engaged by the circumstances of this case. The Commissioner submitted that s. 31 (1) (c) FOIA was engaged and that there is a very strong public interest in protecting the administration of justice so that the balance of public interest favoured maintaining the exemption.

#### *E: Evidence*

29. Mark Fisher's witness statement dated 9 May 2017 explained that he was at the relevant time the Director of the Office for Civil Society in the Department for Culture Media and Sport<sup>1</sup>. His role involves overseeing grants given by Government to youth

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<sup>1</sup> OCS was moved from Cabinet Office to DCMS in a machinery of Government change in July 2016.

organisations pursuant to s. 70 of the Charities Act 2006<sup>2</sup>. Mr Fisher explained that when Kids Company was made subject to a winding up order in August 2015, the Official Receiver was appointed as its liquidator. The Official Receiver's role under s. 132(1) of the Bankruptcy Act 1986 was to investigate the causes of failure of the charitable company, to report on the conduct of its directors, and to distribute any remaining assets to creditors.

30. Mr Fisher acknowledged that Kids company was a high profile case and that it was important for the circumstances leading to its demise to be understood and lessons learned. He pointed to reports already in the public domain from the National Audit Office, Public Accounts Committee, and Public Administration and Constitutional Affairs Committee.

31. Mr Fisher confirmed that the Official Receiver's investigation was on-going at the time of the request and Cabinet Office response.

32. Cross examined by Mr Mitchell, he explained that the Cabinet Office had taken a close interest in the Official Receiver's investigations in September 2016 as it had wanted to see if grant money could be re-paid. His understanding was that, at that time, the Official Receiver was engaged in the serious matter of preparing to question relevant parties.

#### *F: Conclusion*

33. We are satisfied that it was fair and just for the Registrar to permit the Cabinet Office to rely on s. 31 (1) (c) FOIA as a late exemption in the particular circumstances of this case. We have taken into account the fact that the Appellant raised an objection to the Decision Notice's reliance on s. 31 (1) (g) FOIA at a very late stage and gave the other parties no opportunity to respond to it before the initial hearing date. We have also taken into account the fact that the Appellant did not challenge the Registrar's decision to permit the late reliance at the relevant time. We note that both the (g) and (c) exceptions fall within the same section of FOIA and that the same evidential background applied to both exemptions. We are not persuaded that it is unfair to the Appellant to consider the late exemption and we refuse Mr Mitchell's application for us to take s. 31 (1)(c) "off the table".

34. We are satisfied that the Decision Notice was erroneous in upholding the Cabinet Office's reliance upon s. 31 (1) (g) FOIA. As the parties all agree, this exemption was not in fact engaged because the Official Receiver is not a public authority for the purposes of FOIA. For this reason, the appeal is allowed.

35. However, we are satisfied that the exemption under s. 31 (1) (c) FOIA is engaged by the circumstances of this case. The Official Receiver is an Officer of the Court, who was undertaking a statutory investigation with a view to placing his findings before a Court. Those proceedings have not yet concluded. We are satisfied that the withheld information in its entirety engages the exemption concerned with likely prejudice to the administration of justice. We rely on the unchallenged evidence before us that the investigation was at the relevant time at the delicate stage of preparing to question witnesses and conclude that this process was likely to be prejudiced by the disclosure to the world at large of the requested

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<sup>2</sup> <http://www.legislation.gov.uk/ukpga/2006/50/section/70>

information either by giving witnesses advance notice of matters about which they were to be questioned or by inhibiting the willingness of witnesses to assist with the inquiry.

36. The public interest falls to be assessed as at date of the Cabinet office's internal review response (September 2016). We are satisfied that at the relevant time, the public interest lay in protecting the integrity of the Official Receiver's investigation so as to bring the matter fairly to Court. We accept that the Appellant has a particular interest, and that there is a strong interest amongst the public generally, in knowing more about the Kids Company debacle. However, in balancing the relevant considerations, we conclude that the balance tips in favour of maintaining the exemption at the relevant time.

37. Having reached this conclusion in relation to s. 31 (1) (c) FOIA, we do not need to consider the other exemptions relied upon by the Cabinet Office.

38. We note that, as time passes, and once the Directors Disqualification proceedings have been concluded, the public interest test to be applied to a future request for similar information may well lead to a different result.

**(Signed)**

**Alison McKenna**

**Chamber President**

**DATE: 17 September 2018**

**PROMULGATION DATE: 27 September 2018**