



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights  
Decision notice FS50844661**

**Appeal Reference: EA/2020/0104V**

**Heard remotely  
On 14 December 2020**

**Before**

**JUDGE CHRIS HUGHES**

**Between**

**CABINET OFFICE**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

**Appellant: Ewan West  
Respondent: Zoe Gannon**

### **DECISION AND REASONS**

1. On 3 April 2019 an individual wrote to the Cabinet Office seeking very specific information about communications 16 years earlier between the then Prime Minister and Chancellor of the Exchequer: -

*"I am only interested in information generated between 1 March 2003 and 1 June 2003. I am only interested in those direct contacts and communications between the named individuals below. Please do not include contacts and communications written on their behalf by any members of staff.*

*1. During the aforementioned period did Prime Minister Tony Blair write to Gordon Brown, the then Chancellor about the possibility of the UK holding a referendum on*

*whether the UK should join the Euro and or the rights and wrongs of such a referendum.*

*2. If the answer to question one is yes can you please provide copies of this correspondence and communication including emails.*

*3. During the aforementioned period did Mr Brown write to Tony Blair about the possibility of the UK holding a referendum on whether the UK should join the Euro and or the rights and wrongs of such a referendum.*

*4. If the answer to question three is yes can you please provide copies of this correspondence and communication including emails.*

*5. During the aforementioned period did Tony Blair write to Alastair Campbell his then Director of Communications about the possibility of the UK holding a referendum on whether the UK should join the Euro and or the rights and wrongs of such a referendum.*

*6. If the answer to question five is yes can you please provide copies of this correspondence and communication including emails.*

*7. During the aforementioned period did Mr Campbell write to Tony Blair about the possibility of the UK holding a referendum on whether the UK should join the Euro and or the rights and wrongs of such a referendum.*

*8. If the answer to question seven is yes can you please provide copies of this correspondence and communication including emails."*

2. The Cabinet Office confirmed that it held information within the scope of the request and declined to provide it relying on the exemptions in s35(1) (a) and (b): -

*"(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,*  
*(b) Ministerial communications"*

3. The Cabinet Office explained why it maintained that position: -

*Section 35 is a qualified exemption and I have considered whether the balance of public interest favours the release of this material. I recognise that the decision Ministers make may have a significant impact on the lives of citizens and there is a public interest in their deliberations being transparent. These public interests have to be weighed against a strong public interest that policy-making and its implementation are of the highest quality and informed by a full consideration of all the options. Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications. If discussions were routinely made public there is a risk that Ministers may feel inhibited from being frank and candid with one another. As a result, the quality of collective decision making would decline, leading to worse informed and poorer decision making. The ability for ministers to discuss policy making in private is the cornerstone of collective agreement of Cabinet. Protecting this safe space has been consistently maintained as a high bar in the public interest balance.*

*Taking into account all the circumstances of this case, I have concluded that the balance of the public interest favours withholding this information.*

4. The requester sought an internal review of the decision, he noted that he had requested information both under EIR and FOIA and set out his thinking why the information should be disclosed: -

*"The merits of disclosure and the relevant application of Section 35 are quite rightly considered on a case by case basis. Just because one set of communications between Government figures is considered acceptable for release doesn't oblige public bodies to release all other Government communications. I therefore believe this information can be released without posing any risk to any other communications.*

*There are strong public interest grounds for disclosure. Both Mr Blair and Mr Campbell are playing an extremely active role in the campaign for a so called 'Peoples Vote.' or second referendum into Britain's membership of the European Union. I think its only fair that the public is allowed to learn how they viewed referenda and the possibility of a referendum when they were actively campaigning for the UK to join the Euro.*

*This is historic material, the disclosure of which poses no threat to current decision making. I note the documents involved are sixteen years old. The Labour Government's decision not to hold a referendum into Britain's membership of the Euro and some of the Cabinet divisions surrounding that decision were widely reported at the time. I think these media reports further undermine the need for continued confidentiality.*

*The documents are likely to include some information which has nothing to do with policy making. Their contents might include but will not be limited to issues relating to party political strategy, party political management, public relations, public opinion and the general merits of referenda. I believe this information would not be covered by the exemption and it should be released as a matter of course."*

5. When the refusal was upheld, he complained to the Information Commissioner arguing that disclosure was no threat to current decision-making and that: -

*"As you can see my original request for information related to contacts and communications between senior Government figures, who served during Tony Blair's second term of office.*

*I asked for information relating to the debate over whether Britain should have held a referendum into the country's possible entry into the Euro zone.*

*I maintain there are strong public interest grounds for disclosure given that both Mr Blair and Mr Campbell are both prominent figures in the current campaign to force a second Referendum into Britain's EU membership.*

6. In its response the Cabinet Office quoted a statement made by the Chancellor of the Exchequer on European Economic and Monetary Union in the House of Commons on 9 June 2003 stating "if the economics is right we join" noting that "it is well known the Labour Government proposed a referendum on joining the single currency. It stated that the policy issues remained live and contentious and Mr Blair remained a prominent figure in the debate: -

*"Disclosing the information four years ahead of time would render unpredictable when and in what conditions sensitive political information such as this would be disclosed. This would increase the pressure on Ministers and officials to avoid recording matters on which they disagree other than in formal contexts. This will deprive future generations of a complete record of policy deliberations. Unless there is a compelling public interest in disclosure these documents should remain closed. No such public interest is present in this case.*

*The passage of time does not significantly diminish the public interest in withholding the information. Communication between Ministers remains sensitive even after the resolution of the issues discussed. Parliament recognised this when it created the exemption, albeit one subject to a public interest balancing test because it recognised that "the disclosure of certain types of information, such as Ministerial communications, Cabinet papers and minutes would always be likely to prejudice the effective conduct of public affairs".*

7. In her decision notice the Information Commissioner agreed that both exemptions applied. In considering the public interest in disclosure she noted the public interest in transparency of government identified by the Cabinet Office and: -

*"the specific public interest in the public being well-informed about the government's monetary and financial policy and relations with the European Union. The Cabinet Office noted that disclosure of the withheld information could advance the public interests identified above.*

*In bringing his case to the Commissioner the complainant focussed on the balance of the public interest favouring disclosure of the requested information from 2003 because individuals named in the request have been prominent figures in the debate regarding the UK's membership of the European Union."*

8. In considering the interest in withholding the information she noted the Cabinet Office's argument that

*there is a public interest in protecting the process of policy formulation and ensuring that Ministers can engage in policy discussions confident that the details of their discussions will remain confidential. Although the material held by the Cabinet Office is now 16 years old, the Ministers involved at the time of the formulation, particularly*

*Mr Blair, continue to feature prominently in the ongoing debate over future UK relations with the European Union*

9. The Cabinet Office also argued that while disclosure of the information might act to re-frame current discussions in the light of the past positions of the individuals concerned it would not further the debate or advance the understanding of the current issues. The Cabinet Office also argued that Parliament had enacted s35 in the conviction that "*the disclosure of certain types of information, such as Ministerial communications, Cabinet papers and minutes would always be likely to prejudice the effective conduct of public affairs.*" Parliament had decided in 2010 in the Constitutional Reform and Governance Act that such confidentiality should be routinely maintained for 20 years. The Cabinet Office argued that since policy was still in a state of flux the formulation of policy was still a live issue.
10. The Information Commissioner concluded that the balance of public interest lay in disclosure: -

*On balance, she considers that in the current circumstances of national debate there is a compelling public interest in the policy making at the time concerning the UK and Europe. She acknowledges that this was 16 years ago at the time of the request, not 20 years, at which time such information should be opened, as noted by the Cabinet Office in paragraph 23 above. Clearly the withheld information concerns a settled position on the policy of the time, notwithstanding this, she considers that the information would advance public understanding of decision making in Government.*

11. In its appeal the Cabinet Office argued that the Information Commissioner had failed to give due weight to the impact of disclosure and summarised the key points of the decision as: -
  - a. *The Commissioner considered that the policy in question was not under formulation or development at the time of the request (DN, §27);*
  - b. *She was not persuaded that the disclosure of the Disputed Information would influence the content of future discussions (DN, §28);*
  - c. *She was not convinced that Mr Blair's decision to place himself in the public arena during recent debate should impact on the public interest in disclosure (DN, §28);*
  - d. *She did not accept the suggestion that disclosure might result in Ministers and officials seeking to avoid recording matters on which they disagree, other than in formal contexts (DN, §29);*
  - e. *In the Commissioner's opinion it is unreasonable for any Minister to expect that policy development and decision-making should be exempt from any scrutiny (DN, §30);*
  - f. *She considered that scrutiny of decision-making at the time would assist the public's understanding as to how Government considers issues of significance such as whether the UK should have held a referendum on the UK joining the euro (DN, §28). There is a strong public interest in the public being fully informed as to how the government of the day considered the UK joining the euro and a referendum on the issue (DN, §31);*

*g. There is a considerable weight attached to the public interest in the content of the withheld information (DN, §32);*

*h. On balance, the Commissioner considered that in the current circumstances of national debate there is a compelling public interest in the policy making at the time concerning the UK and Europe (DN, §32).*

12. Sir Alexander Allan retired as a Permanent Secretary in 2011. Before that he had been Principal Private Secretary to the Prime Minister from 1992 to 1997, for former Prime Ministers Sir John Major and Tony Blair. From 2004 -2007 he Permanent Secretary of the Department for Constitutional Affairs and then the Ministry of Justice, responsible for the implementation of FOIA. From 2007-2011 he was in the Cabinet Office where he oversaw the review of the 30-year rule and its reduction to 20 years by the Constitutional Reform and Governance Act. Since retirement he was, until very recently, the Prime Minister's Independent Adviser on Ministerial Interests. In this role, I am responsible for advising Ministers on how to comply with the Ministerial Code and investigating alleged breaches of the Code. I am satisfied that he has a considerable experience and understanding of Ministerial behaviour and motivation.
13. He argued that Ministers had an expectation that their communications and deliberations would remain confidential and that FOIA recognised this. A core principle of Cabinet collective responsibility is that discussions of the Cabinet, as well as Ministerial communications and other documents which form part of the process of Cabinet decision-making ahead of meetings, should remain confidential.
14. At the time of the exchanges under consideration Ministers were operating with a well-founded expectation that the records of their discussions with other Cabinet members would remain confidential for at least 30 years ahead of consideration for transfer to The National Archives, such a transfer might not happen after that period (now reduced to 20 years) since the transfer was preceded by a review of the material. While they were aware that FOIA would come into operation they believed that FOIA gave significant protection to their deliberations.
15. The disclosure of these documents some years before it was anticipated that they could be transferred to the National Archive would affect the thinking of current Ministers. He argued that if there were less certainty in the confidentiality of their communications then Ministers and their advisers would be more circumspect in what was committed to paper and the clarity and frankness of the exchanges would be impeded, more communication would be face to face and the absence of the written record of policy formulation would make for less effective policy and decision-making.

16. In closed session Sir Alexander was questioned in detail on the tenor and content of the Disputed Information and the nature of the harm that would be said to arise from its disclosure. Among matters covered was the specific content of the Dispute Information and the context within which it was generated, the expectations of the author and recipient of the Disputed Information, the potential impact on future record-keeping and the impact of the passage of time.

### Consideration

17. The issues between the parties are narrow, both agree that the two exemptions claimed by the Cabinet Office are engaged, the only question between them is the weight of public interest on either side of the question of disclosure.
18. Freedom of information laws are designed to enable the public to access information held by public bodies. The 1998 White Paper set out the reason the Ministry led by Mr Blair adopted the policy which led to FOIA "The traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know". The lead author and editor of the standard work on the Act (Philip Coppel) in the preface to the 1<sup>st</sup> edition (2004, before the Act came into force) observed: -

*"It is true that the Act has been cast widely. With an extensive range of public authorities being netted, but it is also true that the mesh of that net is wide in parts. And yet, this is to miss the central feature of the Freedom of Information act 2000; the role of the public interest and of the Information Commissioner. Together these result in the ultimate "strength" of the act lying in the hands of the latter through his conceptualisation of the former."*

19. FOIA is generally claimed to be applicant and motive blind. However, it is important not to allow such pieties to obscure a proper understanding of the working of FOIA. It is not an abstraction, it is a tool in the hands of people and the value of any request can best be seen in the context of the request, including understanding the reason why the requester believes the information is valuable. The journalist making the request was explicit in his reasons for the request. He viewed the information as historic and of no impact on current decision-making, Cabinet divisions surrounding that decision were widely reported at the time and that those media reports further undermine the need for continued confidentiality. The positive case for disclosure was: -

*Both Mr Blair and Mr Campbell are playing an extremely active role in the campaign for a so called 'Peoples Vote.' or second referendum into Britain's membership of the European Union. I think its only fair that the public is allowed to learn how they viewed referenda and the possibility of a referendum when they were actively campaigning for the UK to join the Euro.*

20. The request was made at the start of April 2019 when there was considerable controversy about the negotiations around the UK's departure from the EU; Parliament was unable to agree on a way forward, on 1 April the House of Commons rejected a customs union by three votes, single market membership by 21 votes and a final say referendum by 12 votes. Two former Prime Ministers (Mr Blair and Mr Brown) had expressed opposition to leaving the EU. Mr Campbell was a leading campaigner for a further referendum. The request was highly specific by identifying between whom the communications passed and that the communications should be highly limited – not copied to other Ministers or officials. It would be naïve not to think that this was somewhat strange, that 16 years after they were sent and when all had long since left office, specific highly confidential communications should be sought. It is almost as though a well-informed person thought that such communications might be interesting.
21. In its response the Cabinet Office included a link to Hansard for a Ministerial statement by Mr Brown on June 9 2003 in which he gave the government's assessment of the extent to which the five tests relating to the UK economy in comparison with the Eurozone had been met. These tests had been adopted in 1997 and needed to be met before the UK joined the European single currency. Mr Brown announced the results of a detailed review and the government's conclusions in the light of that review. The Hansard report of the debate moved on to the opposition response by Mr Michael Howard QC (then Shadow Chancellor and subsequently the Leader of the Opposition at the time of the 2005 General Election). In addition to addressing the direct issues raised in Mr Brown's statement, Mr Howard attacked the government generally, notably addressing the origin of the five tests (written by Mr Ed Balls in the back of a taxi) and the policy divisions between Mr Blair and Mr Brown over Europe. Clearly in making these jibes in the context of a major set-piece debate he did so confident in his belief that they were broadly true and certain in his knowledge that they were widely known to his audience in the House and the wider country. Neither Mr Brown in opening, nor Mr Howard in replying, mentioned a referendum, although subsequent contributors to the debate did and a Draft Bill on the holding of a referendum was later published. Since then key participants in the discussions leading up to the debate of 9 June 2003 have published memoirs. Numerous histories of the period have been written. The journalist who made the request, by specifying the limited dates and individuals clearly wanted to explore what was widely known at all relevant times, a difference of view between the Prime Minister and Chancellor about the merits of joining the Euro, with a view to exploring whether there was a dispute or discussion about a referendum which would be newsworthy in 2019.
22. It is perhaps unfortunate that the implications of this were not fully explored by the Information Commissioner. Her belief that in the current circumstances



of national debate there is a compelling public interest in the policy making at the time concerning the UK and Europe generates two obvious rejoinders,

- why is 16 year old policy formulation in an entirely different context by individuals who have long since left office of compelling public interest now? and
- what new information is in the material which is not already known?

23. The Information Commissioner's failure to engage with the detail of those to questions is fundamental to the weaknesses of her case, she argued that seeing how policy was formulated was of interest. In every Cabinet there are differences of opinion. The point of Cabinet Government in the UK is to bring those differences between leading members of the government into one place to resolve them. The two most influential members of a government are usually the Prime Minister and the Chancellor of the Exchequer and it is inevitable that they will have private exchanges in which different views are expressed on key issues as they shape policy on economic issues. The processes by which differences are harmonised will be broadly similar – whether it is Heath and Barber in 1973, Thatcher, Howe and Lawson in 1983, Major, Lamont and Clarke in 1993, Blair and Brown in 2003 or Cameron and Osborne in 2013. If the value of the information is understanding how Prime Ministers and Chancellors work together then all these examples are equally valid. If the issue is understanding how Prime Ministers, Chancellors and the Prime Minister's key press officer function, then Thatcher Howe and Ingham in 1983 is equally valid. The distinction is that the Heath, Thatcher and Major Cabinet papers are now (largely) held in the National Archive, the Blair and Cameron papers are not.

24. With respect to the information content of the material, the Information Commissioner is at a similar disadvantage. She failed to address the question of what information was contained within the withheld material which was not in the public domain.

25. The Hansard debate and the journalist's argument are an effective rebuttal to the Information Commissioner's reasons for finding a public interest in disclosure -the core facts had been in the public domain for 16 years, the example of how government's function would be well-exemplified by material in the public domain. On this reasoning the information requested is close to "*information reasonably available otherwise than under s1 and therefore exempt*" – in the context of the request the public interest in disclosure is very small.

26. It is appropriate to consider the public interest argument put forward by the journalist. The request was made at the start of April 2019 when there was considerable controversy about the negotiations around the UK's departure from the EU; Parliament was unable to agree on a way forward, on 1 April the House of Commons rejected a customs union by three votes, single market

membership by 21 votes and a final say referendum by 12 votes. Two former Prime Ministers (Mr Blair and Mr Brown) had expressed opposition to leaving the EU. Mr Campbell was a leading campaigner for a further referendum. The request was highly specific by defining between whom the communications passed and that the communications should be highly limited – not copied to other Ministers or officials. It would be naïve not to think that this was somewhat strange, that 16 years after they were sent and when all had long since left office, specific highly confidential communications should be sought. It is almost as though a well-informed person thought that such communications might be interesting. The factual point which he hoped disclosure would illuminate is: -

- *Are the views of these key figures in 2003 when they were in government, different from what they are in 2019 some 14, 12 or 9 years after they left government?*

27. There could be a different level of public interest in disclosure of the information according to the answer to that question. If their views are the same then it could be argued that they are consistent, if not they are inconsistent. However, that distinction is not as great as might be claimed; as JM Keynes stated (in various formulations): -

*“When my information changes, I alter my conclusions. What do you do, sir?”*

28. Without being *“slaves of some defunct economist”* it is an obvious proposition that different questions are raised by the circumstances of 2003 from 2019 and specific responses or actions may or may not continue to be appropriate. The Information Commissioner was correct to state that she is not convinced that Mr Blair’s decision to place himself in the public arena during recent debate should impact on the public interest in disclosure. There is, again, minimal public interest in disclosure on this basis.

29. All the public interest in disclosure is, in aggregate, very slight.

30. It is appropriate to consider the weight to be given to maintaining the confidentiality of the information. The journalist argued that the information is historic; a conclusion with which I have some sympathy.

31. Ministerial documents such as these are not transferred to the National Archive until they have been reviewed after 20 years. That is part of the legal framework underpinning a key constitutional principal, Cabinet Government. The Cabinet Office’s case is the necessity of the protection of collective responsibility and the role of confidentiality in underpinning that and ensuring that Government decisions are well-made and recorded. Sir Alexander is a public servant of great experience and the highest integrity. I find the evidence of Sir Alexander persuasive and I am satisfied that disclosure

would have some impact on the quality of decision making and communication within Government. The argument the Information Commissioner made in her decision notice "*she believes that the public has a right to expect that government Ministers will fulfil their responsibilities in the proper manner and maintain appropriate records*" is an Aunt Sally. Ministers will continue to carry out their offices more or less well, the issue Sir Alexander explored is how the system functions to help Ministers, with all their frailties, discharge their duties as well as possible and in his considered view disclosure would have a tangible negative effect.

32. I conclude that to disregard a significant constitutional principle on the flimsy public interest grounds advanced by the Information Commissioner and the journalist is an error.

33. The appeal is allowed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 14 January 2021