



Case Reference: EA/2021/0203
Neutral Citation Number: [2023] UKFTT 00342 (GRC)

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard by: remote video hearing

**Heard on: 1 and 2 March 2022
Decision given on: 30 March 2023**

Before

**TRIBUNAL JUDGE LYNN GRIFFIN
TRIBUNAL MEMBER AIMÉE GASSTON
TRIBUNAL MEMBER SUSAN WOLF**

Between

ALISTAIR SLOAN

Appellant

and

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

Respondent(s)

Representation:

For the Appellant: in person

For the First Respondent: Will Perry of counsel instructed by Sonia Taylor of the Information Commissioner's legal services department

For the Second Respondent: Cecilia Ivimy of counsel instructed by Sharif Khan of the Government Legal department

Decision: The appeal is Dismissed

REASONS

Background of the request

1. This case concerns a request for information about the Union Policy Implementation Committee ["UPI Committee"] which was a Committee of the Cabinet under Prime Minister Johnson. Its decisions were subject to the convention of Collective Responsibility; this means that when decisions are reached they are binding on all members of the Government, who will be expected to speak with one voice thereafter. The terms of reference for the Committee were "to support the delivery of the Government's priorities in relation to the Union of the United Kingdom."
2. On 29 June 2020 Mr Sloan, the appellant, wrote to the Cabinet Office, the second respondent, to make a request for information under the Freedom of Information Act 2000 ["FOIA"]. His request read as follows

"Pursuant to the general right of access to information contained within the Freedom of Information Act 2000 I request the following information:

a) The dates and persons in attendance (including, but not limited to, Ministers and Special Advisers) at each meeting of the "Union Policy Implementation" Cabinet Committee for the period 13 December 2019 to 29 June 2020 (inclusive).

b) The dates of any planned meetings of the "Union Policy Implementation" Cabinet Committee from 30 June 2020 until 31 December 2020 (inclusive)."

3. The second respondent responded on 16 July 2020 directing the appellant to the published list of membership on the gov.uk website and relied on sections 21 and 35(1)(a) & (b) FOIA in refusing to provide further information. Following an internal review requested by the appellant on 17 July 2020, the second respondent agreed that it was not appropriate to apply section 21 to the request but maintained its reliance on 35(1)(a) & (b) FOIA to withhold the information requested by the appellant.
4. The appellant was not satisfied with the internal review and on 12 August 2020 made a complaint to the Information Commissioner, the first respondent, in which he made clear that he was complaining about the application of the public interest balancing test. He stated that although s35(1)(a) & (b) FOIA were engaged he did not accept that the public interest in maintaining the exemptions outweighed the public interest in disclosure, describing the information he was requesting as "benign" even though the policy area with which the UPI Committee was concerned was a sensitive one given that it concerned the union between Scotland and the rest of the UK.
5. In her decision notice, reference IC-50535-G2J8, dated 29 July 2021 the first respondent decided that s35(1)(a) & (b) FOIA were engaged in relation to the requested material and, "by a very narrow margin", the public interest favoured maintaining the exemption.

The appeal

6. The appellant appeals to this tribunal against that decision on the following grounds, (he has withdrawn a ground relying on a failure to take account of the political climate)
 - a. The Information Commissioner wrongly concluded that the exemption under s. 35(1)(a) FOIA was engaged because the UPI Committee was concerned with policy implementation rather than policy formulation or development.
 - b. The Information Commissioner wrongly concluded that the public interest in maintaining the exemption under s. 35 FOIA outweighed the public interest in disclosure.
7. The first respondent submits that, having had sight of the evidence from the second respondent, the public interest in maintaining the exemption is “marginally stronger” than reflected in the decision notice, but is not as significant as claimed by the second respondent.
8. The second respondent submits that the Information Commissioner was not in error because the exemption in s35(1)(a) is engaged and the balance of the public interests falls in favour of maintaining the exemption and by a broad decisive margin not a narrow one.

The hearing

9. The hearing took place by remote video hearing on 1 & 2 March 2021. There were no communications issues drawn to our attention that adversely affected the ability of any party to participate in the proceedings.
10. I apologise to the parties for the time it has taken to reduce this decision to writing for it to be promulgated.
11. There is no closed decision in this case as this open decision sets out our reasoning.
12. We received evidence in documentary form in the open and closed bundles, written submissions from all parties and a bundle of authorities. We heard oral evidence in open and closed session. The appellant was asked to identify the areas he would like the Tribunal to explore in the closed session. The appellant was supplied with a gist of the closed session. We have considered all of the evidence and submissions and refer in this written decision only to those parts necessary to explain our decision to dismiss the appeal.

The law

13. Section 1(1) FOIA states

“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."

14. Section 35 FOIA provides a qualified exemption and reads (so far as is relevant):

"(1) Information held by a government department ... is exempt information if it relates to

(a) the formulation or development of government policy ...

(b) Ministerial Communications ...

(5) 'Ministerial communications' means any communications -

(a) between Ministers of the Crown ...

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet ..."

15. As s 35(1)(a) & (b) FOIA are qualified exemptions, if they are engaged there must be a balancing of the public interests in accordance with section 2(2) FOIA, which provides (so far as is relevant):

"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) ...

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

16. The first respondent drew our attention to previous decisions of this tribunal where similar issues have been considered and we have noted the approach taken by those tribunal panels.

17. In considering the weight to be given to suggestions that disclosure would disincentivise candour from civil servants, sometimes referred to as a "safe space" or "chilling effect" argument, we have had regard to the words of Charles J in Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC) and the exhortation to note that any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest:

"27. The lack of a right guaranteeing non-disclosure of information, absent consent, means that that information is at risk of disclosure in the overall public interest (i.e. when the public interest in disclosure outweighs the public interest in non-disclosure). As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that if he is properly informed, a person taking part in the discussions will appreciate that the greater the public interest in the

disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed.”

18. In Department for Education v Information Commissioner & Whitmey [2018] UKUT 348 (AAC), the Upper Tribunal said in paragraph 12 et seq that the public interest balance in relation to information that has engaged section 35(1)(b) should be approached with common sense, recognising that in some cases there is a danger of triggering unwarranted speculation by the release of limited information.

“Any assessment of the significance of confidentiality in ministerial communications must be realistic. There is surely no one who believes that all ministers agree with all Government policy or that there are no compromises. It is a truth universally recognised that their collective responsibility is a stance. And there is no need for evidence to show that information is leaked, that journalists are briefed, that there are ‘off the record’ interviews, and that Ministers later publish diaries and write memoirs...”

...The scope of the convention of confidentiality of Ministerial communications – and of collective responsibility for that matter – changed when FOIA came into force. From then on it was qualified by the possibility that information might have to be disclosed. It no longer represented an absolute ideal, albeit one that was not perfectly maintained in practice. Now it was a qualified ideal that was liable to be displaced by the balance of public interests under FOIA...”

19. We conclude from the caselaw that we have been referred to that the outcome of the public interest balance in each case turns on the tribunal’s assessment of the facts they have found in the individual case under consideration.
20. The tribunal has a discretion to allow a public authority to rely on an exemption not relied upon at an earlier stage of dealing with the request for information, Birkett v DEFRA [2011] EWCA Civ 1606.

The evidence and the facts

21. We accept the evidence of Ms Carder, a Deputy Director for the Operation of Cabinet Government Team in the Central Secretariat of the Cabinet Office, and conclude as follows
- a. The Cabinet is the primary decision-making body of government. The composition of Cabinet is determined by each Prime Minister. In order to improve the efficiency of government by reducing the burden on the Cabinet, the Cabinet has used a system of Cabinet committees since the early 20th century. This allows collective decisions to be taken by a smaller group of ministers. It has been the very long standing practice of successive governments not to give an account of the totality of Cabinet committee meetings, including specific information on what was said, the frequency, attendance and content of meetings; this is to support Cabinet Collective Responsibility.
 - b. In government there is a distinction between policies and priorities.

- c. The Government's priority is to support the Union and that priority is supported by a breadth of policies from across government.
- d. The UPI Committee terms of reference demonstrate that it is a Committee which will discuss national policy: "To support the delivery of the Government's priorities in relation to the Union of the United Kingdom." A key part of the UPI Committee's function was to make decisions on policy that support the delivery of government priorities on matters relating to the Union. Those policies are still under development at the time that they are considered by the committee.
- e. The civil service release the membership and terms of reference of committees of Cabinet. The list of standing ministerial members is not always the same as the list of those who attend each meeting. Standing ministerial members are those invited to attend meetings of the Committee. Additional ministers may be invited and those in attendance may include officials or external attendees where necessary.
- f. It is rare for information to be released about who attended a Cabinet committee, albeit there are occasional leaks of information such as with leaks of when the COBRA committee was meeting.
- g. Records of most Cabinet committees are sent to the public archives in due course. Most Ministers are aware that the exemption from disclosure under FOIA is not absolute in all cases. The expectation is high that the records will remain confidential until released to the archives unless the public interest in disclosing them is very high and outweighs confidentiality.
- h. A minister is expected to resign if they cannot publicly support decisions taken in Cabinet or one of its committees. This will signal the minister's disagreement but this does not undermine the doctrine of collective responsibility nor confidentiality. It is not inevitable for a minister's letter of resignation to set out their policy disagreement.
- i. Collective responsibility supports the safe space in which to discuss and produce a unified position.
- j. The Cabinet Manual seeks to codify the convention.
- k. Attendance at a Cabinet Committee should take preference over everything except attendance at the Privy Council. The Chair of a Committee may allow delegation of attendance on request but these requests are carefully handled due to the high expectation of attendance. The standing membership is published but at any given meeting some members may not be able to attend.
- l. Sometimes people are invited to attend to give an expert opinion or invited to give written advice to a Cabinet Committee. How and when this is done is carefully planned.
- m. Taking account of previous leaks of information the risk of speculation arising from disclosure is relatively likely. In some cases the impact of such speculation will be felt quickly but otherwise it would be slower building.
- n. There would be a broader ramifications were the material to be released.
- o. There is a risk that speculation will impact how decisions are reached and how those decisions are communicated more widely. The focus should remain on the policy decisions rather than on the "optics" (how things appear to the

public) and if there is disclosure it would mean that the process could not be organised so freely. There would be a focus on how the decision was reached rather than on the decision itself.

- p. If the material was released there would be a need to consider publishing additional information to place it in context as it would not explain the wider picture of what goes on in government and would lead to further speculation.
- q. Ministers engage in the process on the basis that they can have a free and frank discussion and the circumstances will not be subject to premature or inappropriate scrutiny.

The grounds of appeal

- 22. On the first ground of appeal the appellant made submissions in writing (which he adopted orally) that were divided into three chapters which he described as follows:
 - a. The proper approach to be adopted by public authorities in determining whether an exemption applies.
 - b. The distinction between policy formulation and development and the implementation of policy.
 - c. Whether the information in question relates to the formulation or development of government policy or the implementation of government policy.
- 23. The appellant points out that FOIA is concerned with information and not documents and thus a process of disaggregation may be required but the information should be looked at specifically, as a whole and in its context. The first question is whether the exemption is engaged or in other words does the information requested fall within the class of information protected by that exemption? The second question which only arises if the answer is in the affirmative to the first is whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
- 24. The appellant submits that not every decision taken by a minister will be a decision on policy. He submits that there can be overlap between policy formulation & development and policy implementation; it will be a question of fact and degree in each case. In this case it will be for the tribunal to assess the issues in the light of the evidence from the second respondent. Any need for a safe space must be considered in the light of the facts and circumstances as the tribunal finds them to be.
- 25. The appellant suggests that the UK government's policy is of long standing and is to maintain the Union. This has been noted in previous decisions of this tribunal and there is nothing in this case to suggest it was being reconsidered.
- 26. As to the public interest balancing test the appellant submits that it falls in favour of disclosure of the information he has requested. He suggests
 - a. the tribunal should not assume the worst of the public in applying the test to any alleged speculation that would be caused by disclosure
 - b. collective responsibility would not be harmed by disclosure as the information sought would not disclose anyone views and thus should not be accorded much weight in the balance

- c. ministers and civil servants should not be distracted by any uninformed speculation or debate and this is, in any event a regular feature of political discourse and could be dealt with by education around policy making without releasing information of specific policy information
- d. the safe space needed by the government to consider policy would not be harmed, to any great extent by the disclosure of this information.

27. The appellant does not challenge whether the information engages s35(1)(b) FOIA; relating to Ministerial communications

Analysis and conclusions

28. We note that the application of s35(1)(a) was not in dispute at the time of the appellant's complaint to the first respondent pursuant to s50 FOIA. We also note that it was not in dispute before us that s35(1)(b) was engaged in respect of the information requested. The real focus of this case is where the balance of the public interests lies but we deal first with whether s.35(1)(a) is engaged in relation to the material.

29. Section 35(1) FOIA is a broad, class-based exemption which will capture a wide range of information. The information requested in this case concerns the work of a committee of Cabinet whose work centred on an issue that affects every person in the United Kingdom; whether Scotland should become an independent country or should remain a part of the Union. It is not the task of this tribunal to resolve the issues that surround these questions but we acknowledge the significant and continuing public discourse in this area in all parts of the United Kingdom.

30. We note the title of the committee at the heart of this appeal, is the "Union Policy Implementation Committee", and this could be read to suggest that the committee was concerned with implementation of the policy in respect of the Union, rather than its formulation or development. The terms of reference for the Committee were "to support the delivery of the Government's priorities in relation to the Union of the United Kingdom." Without more the committee might appear to have been solely concerned with the implementation of policy, rather than the formulation or development of policy, but the way a thing is described is not conclusive of its nature.

31. We have concluded that the exemption provided for in s35(1)(a) FOIA is engaged in relation to the withheld material, this is for the following reasons:

- a. Paragraph 2.2 of the Ministerial Code describes the business of Cabinet Committees as primarily concerning "a. questions which significantly engage the collective responsibility of the Government because they raise major issues of policy or because they are of critical importance to the public; b. questions on which there is an unresolved argument between departments."
- b. The nature of the UPI Committee's activities as described above.
- c. In our view there is no one single defining characteristic of a "government policy". A policy could be the promises made to the electorate in a manifesto,

a decision made in response to a particular situation, a detailed plan to deliver a project commitment or a declared aim to be accomplished. Policy may be formulated and developed over time in response to changing circumstances; it may shift in response to those altered circumstances or after consideration remain the same. Policies will serve the aims and objectives of the government of the day. In other words we accept that policy serves the priorities of the government which may be stated as part of the policy as the objective to be achieved, but the delivery of that overarching objective may only be accomplished by the formulation and development of policies to underpin it.

- d. Determining how the government's objective to support the Union is best met is the subject of continual policy formulation, development and renewal. The UPI Committee furthered and assisted in that policy process.

32. Turning then to the balance of the public interests in relation to the material which engages s.35; we have determined that both categories of information raise the same primary public interests. There are the following public interests in favour of disclosure of the information

- a. The general public interest in transparency and accountability relating to government decision making
- b. The Government's policy on the Union is a matter of public interest and concern.

33. The public interests in maintaining the exemption are

- a. The public interest in maintaining the confidentiality of Cabinet and Cabinet committee discussions,
- b. The public interest in maintaining the confidentiality of Cabinet collective responsibility,
- c. The public interest in the maintenance of a safe space in which civil servants can give advice candidly,
- d. The public interest in sound policy development and good government.

34. As to the harm that might be caused by disclosure, we have concluded that disclosure would result in prejudice, because it would

- a. place ministers under pressure to
 - i. schedule meetings when they are not required
 - ii. attend meetings where such attendance is not required under the ministerial code or be necessary in the circumstances
- b. adversely impact the maintenance of a safe space in which civil servants can give advice candidly and therefore sound policy development and good government
- c. allow the information disclosed to be combined with material already in the public domain about what decisions were taken at which meeting in order to draw conclusions about those who had taken the decisions
- d. result in speculation by the public.

35. In the view of the majority of the Tribunal the balance of the public interests falls in favour of maintaining the exemption from disclosure. Transparency and accountability are important public interests but not pre-eminent in the balancing exercise and given the nature of the material in issue, disclosure would not materially increase Government transparency and accountability, improve public debate or result in any other significant public benefit.
36. There is a long-standing convention that the minutes of Cabinet and Cabinet committee meetings are not ordinarily made public before they are transferred to the National Archives; this convention extends to not publishing the dates of such meetings nor attendances. This convention reflects the strong public interest in maintaining the confidentiality of Cabinet and Cabinet committee discussions. Such confidentiality is necessary to maintain the constitutional principle of collective responsibility which requires a private space in which policy can be discussed and developed at the highest level in advance of a single government position being agreed. Once agreed, policy is announced publicly. These issues are set out and explained in the Ministerial Code.
37. If a safe space for debate and policy formulation is to function there has to be a working assumption that the advice given, and discussions and ministerial communications will remain confidential. Such a working assumption does not have to be an assumption of absolute confidentiality in all circumstances, the first respondent is correct to submit that any minister thinking it was so would be mistaken. However, there is a strong public interest in the maintenance of collective Cabinet responsibility and thus ministers are correct to work on the basis that discussions in the course of policy formulation will remain confidential unless there is a countervailing public interest that outweighs it. This is how Parliament intended FOIA to operate.
38. The nature of the withheld information is in the words of the Information Commissioner "fairly anodyne". The appellant and first respondent argue that there would be little harm or prejudice caused by the release of the information given its anodyne nature. However, conversely if they are correct about the "anodyne" nature of the material, it would not assist the public in understanding government priorities in relation to this area of policy.
39. We have considered whether the dates can be disaggregated. We have concluded that the dates of previous meetings of the UPI Committee, and proposed dates of future meetings, is not itself information of any significant public interest. This is because the date of any given meeting does not reveal what was discussed during that meeting and would not therefore contribute in any significant way to informed public debate on topics relevant to the Union. However, if the date were to be matched with other information it is likely to lead to inferences and speculation about the content of the meetings and about who made the decisions. Such speculation would be conjecture, rather than informed debate and would be contrary to the public interest.

40. Furthermore, the number and dates of meetings over a given period is unlikely to shed any significant light on the policy process as a whole, because policy regarding the Union, in common with other policy issues, may be discussed and developed in other meetings and correspondence across the Cabinet Office and other Departments. We have concluded on all of the evidence that there is a real risk of such speculation given the public's interest in the possibility of change in the structure of the Union.
41. Details of who attended a given meeting of the UPI Committee without disclosure of the content of the meeting is not of any significant public interest because such disclosure is likely to lead to speculation as to the topics discussed and the input of individuals, rather than informed debate. Given that ministers and others may participate in policy discussions on the Union in a number of different ways, partial disclosure of this kind would therefore be contrary to the public interest as it would tend to be misleading.
42. In this context we do not accept that the material requested in either part of the request is "anodyne" in the sense of being innocuous but rather that it forms one of the building blocks of collective responsibility which is a convention of constitutional importance. Removal of part of the foundation upon which a doctrine rests will weaken its integrity and undermine it.
43. Dr Gasston dissented from the majority view set out above and decided that although it was finely balanced decision, on balance the public interest in disclosure outweighed the public interest in maintaining the exemption.
44. For these reasons, by a majority, the Tribunal finds that s35(1)(a) and s35(1)(b) are engaged in relation to the requested material and that the public interest balance falls in favour of the maintenance of the exemption from disclosure.

The application of s40(2) FOIA (personal data)

45. As to the application of s40(2) FOIA, to withhold the names of "any junior civil servant who attended any UPI Cabinet Committee meetings between 13 December 2019 and 29 June 2020 to perform secretariat functions ". The second respondent having raised the issue of the application of s40(2) FOIA to the names of junior civil servants during the appeal proceedings, the appellant originally submitted that s40(2) should not operate in this case as a ground for non-disclosure of the requested information. However by the time of the hearing this issue had been resolved and there was agreement between the parties.
46. The first question is whether we should exercise our discretion to allow the second respondent to rely on section 40(2), the second is whether s40(2) applies to any of the withheld material. Given that the parties agree that s40(2) does apply and thus it would not be appropriate to release the names of those junior civil servants and this would protect the interests of those who are not parties to these proceedings we

exercise our discretion to allow reliance on s40(2) FOIA and find that it applies to the names which should not be disclosed.

47. For all these reasons we conclude that the Information Commissioner was not in error of law in her decision notice and nor did she exercise any discretion wrongly. The appeal is dismissed.

Signed Judge Lynn Griffin

Date: 24 March 2023