



Neutral Citation number: [2024] UKFTT 00334 (GRC)

Appeal Number: EA/2023/0031

Decision given on: 25 April 2024

**First-Tier Tribunal
(General Regulatory Chamber)
Information Rights**

Between:

DEPARTMENT FOR WORK AND PENSIONS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Date of Hearing: 12 September 2023 & deliberations 2 January 2024.

Panel: Brian Kennedy KC, Marion Saunders and Pieter de Waal.

Hearing Type: Remote hearing using HMCTS Cloud Video Platform

Representation:

For the Appellant: Robert Cohen of Counsel.

For the Respondent: Harry Gillow of Counsel.

Result: The appeal is dismissed.

Date of Decision: 2 January 2024.

REASONS

Introduction:

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 16 December 2022 (reference IC-135964-Y7V0), which is a matter of public record.

Factual background and issues:

- [2] Full details of the background to this appeal are set out in the DN. The appeal relates to a request made to the Department for Work and Pensions (“DWP”) on 12 September 2021 for the following information:

“Full copies of all internal modelling, presentations, briefing materials and impact assessments relating to the end of the £20 per week universal credit uplift”.

- [3] The background to the Universal Credit uplift during the Covid-19 pandemic (taken from the House of Lords article “Universal credit: an end to the uplift” published on 3 September 2021) is set out in the DN. In brief, on 20 March 2020 the then Chancellor of the Exchequer announced that the standard allowances of Universal Credit and the basic element of Working Tax Credit would be increased by £1,000 a year (or £20 a week). He said that this uplift was designed to “strengthen the safety net” during the Covid-19 pandemic and was part of a wider support package for household finances. The uplift was initially intended to last 12 months and was due to expire in April 2021. However, at the March 2021 budget the Government announced that it would be extended for a further six months. In

July 2021 the Government confirmed that it would withdraw the uplift at the end of September 2021.

- [4]** The request was refused by the DWP on 23 September 2021 in reliance on the exemptions at Sections 36(2)(b) and (c) of FOIA, which provide:

Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act... (b) would, or would be likely to, inhibit i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation, or (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

- [5]** These exemptions are subject to the public interest test under Section 2(2) of FOIA, which means that the right of access to information does not apply to information which is exempt by virtue of Section 36 of FOIA if or to the extent that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

- [6]** The Commissioner concluded in the DN dated 16 December 2022 that there were defects in the procedure by which the qualified person had given an opinion for the purposes of reliance on the section 36 exemptions.¹ The DWP accepts that conclusion. The Commissioner's DN also required the DWP to disclose the requested information with the exception of information exempt under section 42(1) of FOIA (see below).

- [7]** On 12 January 2023 the Tribunal received the DWP's notice of appeal against the DN together with an application for an extension of time to file its grounds of appeal, which were filed on 3 February 2023 (dated 31 January 2023). The grounds of appeal make reference to a fresh submission that was placed before a (new)

¹ Since the Commissioner found that the exemptions were not engaged, it was not necessary to make any decision relating to the public interest test.

qualified person² who on this occasion considered the withheld information and concluded that disclosure of the requested information would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation (Section 36(2)(b) of FOIA) or would otherwise prejudice the effective conduct of public affairs (Section 36(c) of FOIA), and that the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.

Jurisdiction:

- [8] In view of this sequence of events, a question arises as to whether the Tribunal is able to deal with the appeal. Section 58 of FOIA provides (with our emphasis):

Determination of appeals.

(1) If on an appeal under section 57 the Tribunal considers –

*(a) that **the notice** against which the appeal is brought [i.e. a decision notice issued by the Commissioner] 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.***

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

- [9] The point was addressed as follows by the DWP in its grounds of appeal.

- [10] A public authority is permitted to rely on an exemption before the Tribunal which was not relied on before the Commissioner. By analogy, the DWP is permitted to rely on a ‘fresh’ opinion from a qualified person for purposes of the exemptions in

² A witness statement subsequently filed by the DWP confirms that this happened on 27 January 2023, i.e. after the notice of appeal was filed and a few days before the grounds of appeal were filed.

section 36 of FOIA. In *Information Commissioner v Home Office* [2011] UKUT 17 (AAC), UTJ Jacobs held that the handling of a FOIA request by a public authority is 'administrative', and 'does not involve any commitment as to the future' (at ¶18). 'As a whole, the structure of FOIA is not consistent with a prohibition on raising new exceptions.' At §29, it was held:

In summary, a public authority is allowed to change its position to disclose information. If it is not allowed to change its position to rely on another exemption, this may hamper a full consideration of the public interest and prevent the interests of third parties being taken into account.

[11] The Upper Tribunal also considered the Tribunal's role on appeal:

57. As to the function of [s.58 FOIA], the First-tier Tribunal hears appeals under a variety of legislation. There are various formulations in different legislation, but generally they have in common that the tribunal is required to undertake a fresh consideration of the case on the evidence and arguments put to it. That is what I expect to find in the case of an initial appeal from a decision-maker in a public body, as the tribunal will give the case the first judicial consideration. It is the nature of such an appeal that there is generally no restriction on the issues, evidence or argument that the tribunal can consider. This is, of course, subject to any express or implied limitation.

58. That is what section 58 does. The tribunal is required to consider whether the Commissioner's decision notice was in accordance with law. That directs attention to the contents of the notice and the scope of the Commissioner's duty under section 50. And that directs attention to whether the public authority is required to disclose the information. There is nothing in the language of the section or inherent in the nature of the tribunal's task to limit the scope of that consideration. In other words, the section imposes the 'in accordance with the law' test on the tribunal to decide independently and afresh. It is inherent in that task that the tribunal must consider any relevant issue put it by any of the parties. That includes a new exemption relied on by the public authority.

[12] In *Birkett v DEFRA* [2011] EWCA Civ 1606, a case involving the Environmental Information Regulations, the Court of Appeal agreed that new exemptions could be relied on as of right at least until the point that a response under rule 23 of the General Regulatory Chamber tribunal procedure rules is provided. It held:

28 [...] The Tribunal is a creature of statute. Not only is there no need for a non-statutory discretion such as that purportedly exercised by the Tribunal in the present case; there is no scope for the exercise of such a discretion in a statutory scheme which requires the public authority to set out its grounds of appeal, or grounds of opposition in response to an appeal, within a particular timescale, and which expressly envisages in the case of the latter that those grounds may not be contained in another document provided with the response, i.e. that they may contain new reasoning.

[13] In *McInerney v Information Commissioner*, UTJ Jacobs noted at §32 that ‘there is no Upper Tribunal decision that disagrees with my conclusion or my reasoning in the *Home Office* case. My understanding is that it is now generally accepted as correct and that the Court of Appeal’s decision on the EIR [in *Birkett*] is treated as supporting my decision on FOIA.’

[14] It follows, submitted the DWP, that the DWP is permitted to rely on the new opinion of a qualified person obtained after the Commissioner issued the DN.

[15] The Commissioner does not object to this analysis in response to the DWP’s appeal. The Tribunal is equally content to proceed accordingly and to undertake a fresh consideration of the case on the evidence and arguments put to it by both the DWP and the Commissioner in the appeal.

The issues:

[16] The Commissioner now accepts in this appeal that, following the fresh submission to the qualified person subsequent to the DN, Section 36(2)(b) of FOIA applies to

the requested information.³ However, the DWP and the Commissioner disagree on the question of whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

[17] In respect of a small amount of information falling within the scope of the request the DWP also relied on the exemption in Section 42 of FOIA, which provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information. In the DN the Commissioner accepted that legal professional privilege applies to a limited amount of information covered by the request. The DWP no longer appeals against this aspect of the DN.

[18] This means that the issues have narrowed since the DN was issued and since the appeal was filed, and that the principal point to be determined is the public interest test which applies to the exemption in section 36(2)(b) of FOIA.

[19] The Tribunal was helpfully assisted in the hearing of this appeal by written and oral submissions made on behalf of the DWP and the Commissioner and by open and closed witness statements filed on behalf of the DWP. A Gist of the closed evidence is attached as Appendix A. The Tribunal also received a closed bundle comprising the information withheld by the DWP in response to the request.

The section 42 exemption and public interest test

[20] While the DWP no longer appeals against the Commissioner's DN relating to the extent to which the Section 42 exemption applies to a limited amount of the withheld information, at the hearing the Tribunal questioned whether that

³ In the appeal the DWP did not press the point as to whether separate considerations arise under section 36(2)(c). Given that the Commissioner now accepts that the exemption in section 36(2)(b) is engaged (but subject to the public interest test), the DWP took the position that the question of whether or not releasing the requested information would or would be likely to otherwise prejudice the effective conduct of public affairs is largely moot.

information qualifies for protection under legal professional privilege. The Tribunal also questioned whether the information constitutes communications between a lawyer and client for the purpose of obtaining legal advice or in connection with existing or reasonably contemplated litigation. (While the Tribunal had understood from the DN and from the DWP's submissions and evidence that it is legal advice privilege which is asserted by the DWP, it was suggested by Counsel for the Commissioner at the hearing that the information was subject to litigation privilege.)

- [21] The Tribunal subsequently issued directions seeking submissions from the DWP on these questions and on the public interest test. We received helpful closed submissions, supported by a closed witness statement, explaining why on a proper legal and factual reading of the relevant information it qualifies for both legal advice privilege and litigation privilege.
- [22] The DWP's closed submissions also addressed the DWP's reasons for assessing that in all the circumstances of the case the public interest in maintaining the Section 42 exemption outweighs the public interest in disclosing the information.
- [23] The Commissioner did not file any submissions on these points in reply. As mentioned at the outset, there is no longer any dispute between the DWP and the Commissioner about the DWP's reliance on the section 42 exemption in respect of a limited amount of the withheld information.
- [24] The Tribunal accepts the submissions and evidence given by the DWP in accordance with the Tribunal's directions to support the DWP's reliance on this exemption. The Tribunal also accepts that in all the circumstances the public interest in maintaining the exemption in respect of a limited amount of privileged information outweighs the public interest in disclosing the information.

The section 36 exemption and public interest test:

- [25] While the Commissioner and the DWP arrived at an agreed position that the information withheld by the DWP is exempt under section 36 of FOIA because disclosure would or would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, they have different views on whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- [26] Both parties agree that the subject matter of this appeal is of significant public interest and agree with the trite proposition that there is a strong public interest in transparency of Governmental decision-making.
- [27] While the Commissioner noted that the policy decision to which the information request relates was controversial, the DWP said that this is double-edged: While controversy is capable of increasing public interest, it is also liable to increase the risk of a chilling effect on officials and to increase the risk of distortion and misunderstanding of information. There is an equal countervailing interest in ensuring that decision-making is based on the ability of officials to give their views and analysis without fear. The need for a free space in which to make such decisions is important. If officials could not be sure that their input into the formulation of Government policy and decision-making is protected from public disclosure, there would be a strong incentive to omit or to diminish 'negative' information and the prejudice likely to be caused by its disclosure. Moreover, the public interest in publication of information is to a great extent satisfied by the fact that the DWP has publicly stated its justifications for the policy in question. The public can access these explanations, which are already in the public domain.
- [28] The DWP also said that the public interest in free and frank discussion and analysis of difficult policy choices and in the ability of officials to act free from inhibition in such circumstances is especially prominent. It does not serve the public interest for the discussion of any controversial topic to be pervasive or inhibited due to fears of subsequent misinterpretation.

[29] The Commissioner made these submissions in response to the DWP's grounds of appeal in respect of the public interest test:

[30] When assessing the public interest balance under the section 36 exemption, appropriate weight should be given to the opinion of the qualified person: *Department for Works and Pensions v Information Commissioner & Zola* [2016] EWCA Civ 758 at [55].

[31] The opinion of the qualified person is not, however, conclusive: *Guardian Newspapers Ltd and Brooke v Information Commissioner & BBC* (EA/2006/0011 and EA/2006/0013, 8 January 2007) at [92]:

In our judgment the right approach, consistent with the language and scheme of the Act is this: the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by s2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur.

[32] The Tribunal has generally been sceptical of arguments that disclosure will inhibit free and frank discussion in the future - *Davies v Information Commissioner and the Cabinet Office* [2019] UKUT 185 (AAC) at [25]:

*There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of public affairs are to be treated with some caution. In *Department for Education and Skills v Information Commissioner and Evening Standard* EA/2006/0006, the First-tier Tribunal commented at [75(vii)] as follows:*

“In judging the likely consequences of disclosure on officials’ future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department’s position, whether or not it is their own.”

- [33]** The Commissioner considered that there was a strong public interest in openness and transparency both generally and in this specific case. In particular, there was a strong public interest in being able to understand the reasoning behind the decision to end the Universal Credit uplift and the information that was available to decision-makers at the time. The Commissioner accepted that the controversial nature of the decision was a factor both in favour of and against disclosure.
- [34]** The Commissioner did not, however, consider the DWP’s arguments about chilling effect to be convincing. The Commissioner submitted that the Tribunal has historically been sceptical of such arguments: *Davies v IC and Cabinet Office*. The Commissioner did not consider it likely that disclosure of the withheld information would have any substantial chilling effect in this case, even taking into account the controversial nature of the decision relating to the Universal Credit uplift. As such, the Commissioner’s view was that the controversial nature of the decision is a factor in favour of disclosure. In respect of transparency, the Commissioner also noted that the publicly stated justification for the decision was made after the date of the DWP’s final refusal of the request (save for the Social Security Up-rating of Benefits Bill on Wednesday 13 October 2021) and as such did not assist in assessing the public interest at that date.
- [35]** Finally, insofar as there was genuine concern about the possibility of misinterpretation arising from disclosure of the withheld information as argued by the DWP, in the Commissioner’s view this could be met by a proper explanation

from the DWP, in particular that the information was based on limited pre-pandemic information which did not give an accurate view of the current situation.

[36] In reply, the DWP was of the view that the Commissioner's assessment of public interest did not do justice to the complexity of the issue, or the nuances identified by the DWP. The DWP had identified a case-specific risk of chilling effect, which the ICO did not address. The withheld information suffered from necessary limitations. While it served as a useful tool for ministers and officials, it is necessarily imperfect. In such circumstances there is a substantial risk of future discussions between ministers and officials being hindered. Such discussions will often benefit from inchoate or imperfect analysis being considered. But releasing such analysis to the world would lead to unfair criticism, misunderstanding and confusion. In turn this would lead to officials being much more reticent.

[37] The DWP also stressed that, as recognised in the Commissioner's DN, the policy context of the withheld information was especially febrile. This made the chilling effect identified by the DWP likely to ensue. Such a chilling effect would be contrary to the public interest, which is best served by ministers having as much analysis as is possible. The DWP was also concerned that releasing the withheld information would lead to policy-making being misrepresented and misunderstood. If (as is common ground) transparency is central to the public interest, then creating uncertainty and misunderstanding is inimical to it.

Decision:

[38] Having viewed the withheld information, the Tribunal can see some merit in the DWP's concerns which principally relate to a risk that its disclosure would create a chilling effect on decision-making and a risk of misinformation. However, the Tribunal does not agree with the DWP's assertion that the Commissioner failed to adequately address these concerns in the appeal or erred in assessing them.

- [39]** The Commissioner's reply to the 'chilling effect' argument is that the starting point is that civil servants are expected to be robust in the face of public scrutiny and criticism (*Davies v Information Commissioner and the Cabinet Office* [2019] UKUT 185 (AAC) at [25]) and that the Tribunal is "entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms".
- [40]** The Commissioner stressed that in this case it is important to bear in mind the time at which the public interest is to be assessed, namely as of the date of first refusal of the request by the DWP. At that time, the policy in question (i.e. to discontinue the Universal Credit uplift) had already been finalised and announced and the relevant decision had already been taken months before. Accordingly, the policy was not 'live' at the time of the request, and concerns over a safe space for policy formulation have much less weight as a result.
- [41]** The Commissioner said that the DWP did not taken proper account of the extremely unusual circumstances in which the withheld information was produced. First, the pandemic conditions were unprecedented and the prospect of a 'chilling effect' is reduced where similar circumstances are unlikely to recur. Second, civil servants can be expected to operate under difficult conditions at times, and the fact that they do so in a particular instance does not mean that the work undertaken by them in those conditions should be immune from scrutiny.
- [42]** In respect of the risk of misinformation, the Commissioner submitted that misunderstanding of published information is always a possibility and does not provide a strong argument against disclosure absent compelling reasons why there would be a particularly serious risk of misinformation in an individual case. No compelling reason was identified in this case.
- [43]** The Commissioner was not convinced by the assertion that significant resources would be required to correct any potential for public misunderstanding of the

withheld information. The Commissioner's position is that it is open to the DWP to provide an explanation of any issues relating to accuracy or interpretation of the information, or any other concerns it might have.

[44] The Commissioner considered that any concerns about partial disclosure could again be addressed by way of appropriate explanation or by further voluntary disclosure of information to provide context and a more complete picture. Public understanding, and therefore the public interest, is best served by disclosure of relevant material, even if that is necessarily partial. The public can be expected to appreciate and understand the difficult conditions in which the information was produced.

[45] Set against the DWP's concerns, the Commissioner considered that the public interest in disclosure was very strong. The circumstances surrounding the production of the withheld information were unique. The public has a very strong interest in understanding how decisions over Universal Credit support during the pandemic, and the continuation or discontinuation of that support, were made.

[46] Insofar as information was published voluntarily to assist public understanding after the information request was made, the Commissioner submitted that this is of no relevance to the public interest balance. While the DWP clarified that it regularly publishes information, this is of limited use where direct scrutiny of material used in decision-making is much more important as a means of transparency.

[47] Like the Commissioner, the Tribunal accepts that the opinion of the new qualified person to support reliance on the Section 36(2)(b) exemption subsequent to the DN was a reasonable one and that the concerns identified by the DWP and the qualified person with disclosure of the withheld information are legitimate.

[48] However, in assessing the public interest test the Tribunal agrees with the Commissioner that those concerns are reasonably capable of mitigation by

appropriate measures. We have also taken into account that the public interest test must be assessed not generically but, in a time-specific and case-specific way. At the time of the request (12 September 2021), the Government had already confirmed its policy that the Universal Credit uplift would be withdrawn. This reduces the risk that disclosure of the withheld information would have caused a 'chilling effect' or otherwise inhibited the free and frank provision of advice or exchange of views specifically informing the decisions that were made on the Universal Credit uplift.

[49] Taking into account all relevant factors, the Tribunal considers that in all the circumstances of this case the public interest in maintaining the Section 36(2)(b) exemption does not outweigh the significant public interest in disclosure of the withheld information.

[50] Accordingly, the Tribunal has no reason to determine that the Commissioner's response to this appeal is not in accordance with the law or that the exercise of discretion in respect of the public interest test as presented by the Commissioner in the appeal ought to be exercised differently.

Substituted Decision Notice

The Tribunal orders that the DWP is to disclose to the requester within 28 days of this judgment all the withheld information in the Closed Bundle except for information which is exempt under Section 42 of FOIA as agreed between the DWP and the Commissioner and any personal data. The Excel spreadsheet in the Closed Bundle must be converted to and disclosed in a format that is not capable of being modified (for example in PDF format) and must not be disclosed as a working spreadsheet.

Any failure to abide by the terms of the Tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

Brian Kennedy KC

15 January 2024.