



Neutral citation number: [2024] UKFTT 00571 (GRC)

Case Reference: FT/EA/2024/0049

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

**Heard on 27 June 2024 on the Papers.
Decision given: 1 July 2024**

Before:

Panel: Brian Kennedy KC with Panel Specialists Anne Chafer & Kerry Pepperell.

Between:

DANIEL EDWARDS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant The appellant as a litigant in Person

For the Respondent: Sapna Gangani – ICO in writing by way of Response.

Decision: The appeal is dismissed.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“FOIA”) against the decision notice of the Commissioner dated 29 January 2024 Ref. IC-251531- F7L7 (“the DN”) which is a matter of public record.

Factual Background:

2. On 12 July 2023 the Appellant wrote to HM Treasury (“HMT”) making the following request for information under the FOIA:
3. “I would like to request the Treasury's latest assessment on the negative impact to net tax revenue from behavioural change due to the income tax personal allowance taper”.
4. On 24 July 2023, HMT responded. It refused to provide the requested information. It cited the following exemption as its basis for doing so: - section 35(1)(a).
5. The Appellant requested an internal review on 24 July 2023. HMT sent him the outcome of its internal review on 11 August 2023. It upheld its original position.
6. The Appellant contacted the Commissioner on 11 August 2023 to complain about the way his request for information had been handled.
7. During the course of the Commissioner’s investigation HMT also introduced reliance on section 29(1)(a) – prejudice to the economic interests of the UK or any part of it.
8. Following the investigation the Commissioner issued Decision Notice IC-251531-F7L7 on 29 January 2024 upholding HMT’s reliance on s35(1)(a) to withhold the requested information. The Commissioner did not go on to consider or make a finding on HMT’s reliance on s29(1)(a) FOIA. The DN was attached by the Commissioner as Annex A and should be read in conjunction with his Response.

Legal Framework:

9. By s.1 FOIA, public authorities are under a general duty to disclose information they hold where it is requested under FOIA:
 1. - General right of access to information held by public authorities.

- (1) 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.
10. The duty to provide such information is subject to the exemptions contained within Part II of FOIA (Exempt Information).
11. Section 35(1)(a) of FOIA provides:
- (1) Information held by a government department ... is exempt information if it relates to (a) the formulation or development of government policy...
12. The purpose of the section 35(1)(a) exemption is to protect the efficient, effective and high-quality formulation and development of government policy: *DHSC v IC* [2020] UKUT 299 at [24].
13. S35(1)(a) is subject to the public interest balance.
14. The material time to consider the public interest balance is the time of the response to the request – see *Montague v Information Commissioner & Department of International Trade* [2022] UKUT 104 (AAC) (‘Montague’)
15. Relevant principles regarding the operation of the public interest test in the context of section 35(1)(a) have been discussed by the FTT in many cases indicating that the following should guide decisions as to disclosure in such a case as this:
- (i) The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.
- (ii) No information within s.35(1) is exempt from the duty of disclosure simply on account of its status, of its classification as minutes or advice to a minister nor of the seniority of those whose actions are recorded.
- (iii) The purpose of confidentiality, where the exemption is to be maintained, is the protection from compromise or unjust public opprobrium of civil servants, not ministers.
- (iv) The timing of a request is of paramount importance to the decision. Disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to

considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of speculation or headlines depicting that which has been merely broached as agreed policy.

16. Key considerations providing a public interest against disclosure include allowing a “safe space” for discussions away from the interference public knowledge could bring, as well as the potential chilling effect on discussions. The Commissioner’s guidance on section 35 notes at [206]:
“Chilling effect arguments operate at various levels. If the policy in question is still live, arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight.”
17. In *Department for Business, Enterprise and Regulatory Reform v IC and Friends of the Earth EA/2007/0072* the FTT accepted that “... *there is a strong public interest in the value of government being able to test ideas with informed third parties out of the public eye and knowing what the reaction of particular groups of stakeholders might be if particular policy lines/negotiating positions were to be taken.*”

The Decision Notice:

18. The essential rational in the DN is summarised as follows;
19. In relation to S35(1)(a) the Commissioner understands “*formulation*” to broadly refer to the design of new policy, and “*development*” to the process of reviewing or improving existing policy. The Commissioner describes the purpose of the subsection is to protect the integrity of the policymaking process and to prevent disclosures which would undermine the process and result in a less robust, less well considered policy options. The Commissioner found that as the exemption is class based, it is only necessary for the withheld information to “*relate to*” the formulation or development of government policy for the exemption to be engaged and any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption. In the course of his investigation the Commissioner established that HMT considers the exemption engaged in this instance because there is information within the scope of the request which relates to the formulation and development of the following Government policy viz: Personal Allowance. The Commissioner considered the withheld information and HMT’s explanation, and the Appellant’s arguments. Although the Commissioner cannot reproduce HMT’s arguments without disclosing the withheld information, he has confirmed that he has taken the Appellant’s comments into account before reaching his decision (see DN §§19-29). The Tribunal are also in a position to confirm this.
20. The Commissioner also acknowledged this qualified exemption is subject to the public Interest test and went on to apply the test in an appropriate manner (see DN §§10-17).

21. In the Commissioner's view two questions had to be addressed in considering where the balance of the public interest lies in this case. Firstly, whether policy deliberations on the personal allowance taper was live at the time of the request, and secondly, whether the withheld information relates to the formulation or development of any other policy.
22. The Commissioner considered the key issue in this case was the timing of the request. He acknowledged and understood the Appellant's scepticism that it continues to be a live matter, however having seen the withheld information and having considered the full detail of HMT's arguments, he was satisfied that it was still a live matter at the time of the request and he noted that the request is specifically for "*HMT's latest assessment*" and this related to information that is recent (live) and as such it is necessarily more sensitive. (see DN §§ 26 - 28).
23. The Commissioner concluded that the public interest in maintaining the exemption at s35(1) (a) outweighs the public interest in disclosure at the time of the request with particular regard to the timing of the request (see DN §29).
24. The Commissioner in these circumstances did not continue to consider whether HMT could also rely on s29 FOIA as the basis for withholding the same information (see DN §30).

Grounds of Appeal:

25. On 2 February 2024, the FtT received the Appellant's appeal against the DN under s.57 FOIA.
26. Inter-alia the Appellant submits there remains a conflict between previous precedence from Decision Notice FS50711516 and this latest DN. HMT, the Appellant argues was wrong to apply the Section 35 exemption in 2018 and it remains wrong to do so now given that the policy was implemented almost 15 years ago and remains unchanged. There is simply no evidence, he submits to suggest that withholding the information would in any way prejudice "live" policy today if it did not do so six years ago regarding the exact same unamended legislation. Essentially the Appellant advances two submissions in his grounds of appeal in that he denies s35(1) is engaged as he quotes a 2018 decision notice which ordered disclosure of the same information and further the Appellant denies the policy is "live."

The Commissioner's Response:

27. The Commissioner resists this appeal. Generally, the Commissioner relies on the DN as setting out his findings and the reasons for those findings, and repeated the matters stated therein.
28. Further the Commissioner submits that the fact that a previous decision notice ordered disclosure is irrelevant. Decision Notices are not binding, and the Commissioner maintains he was correct to uphold HMT's reliance on s35 for the reasons provided in the DN, and the public interest favoured maintaining the exemption.
29. The Appellant's denial that the policy is live was noted by the Commissioner during the investigation. However, having read HMT's submissions he decided s35 applied.
30. The Commissioner submits that the Appellant's denial does nothing to dislodge this finding.

Conclusion:

31. Having considered all the evidence and submissions, the Tribunal have also had the advantage of access to the withheld information, and like the Commissioner are unable to disclose the nature or extent of any information arising, but we are in a position to make a judgment on the issues before us on the basis of what we are privy to in these circumstances.
32. In effect we accept and adopt the Commissioners reasoning in this appeal as we can find no error of Law in the DN nor in the exercise of his discretion by the Commissioner within his conclusions therein.
33. Accordingly, we must dismiss this appeal.

Brian Kennedy KC

28 June 2024.

Promulgated on: 1 July 2024