IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

Case No. EA/2013/0278

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50507217
Dated: 28 November 2013

Appellant:	**Tony Stott**
First Respondent:	**The Information Commissioner**
Second Respondent:	**The Welsh Assembly Government**

On the papers

Date of decision: 16 July 2014

Before
Chris Ryan
(Judge)
and
Melanie Howard
Andrew Whetnall

Subject matter:
Formulation or development of government policy s.35(1)(a)

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2013/0278**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Summary

1. We have decided to dismiss the appeal because the records of meetings of a Task and Finish Group established by the Welsh Assembly Government in 2012 in respect of certain proposed legislation was exempt information under section 35(1)(a) of the Freedom of Information Act 2000 ("FOIA") and the public interest in maintaining that exemption, at the date of the request for information, outweighed the public interest in its disclosure

Background

2. In 2012 the Welsh Assembly Government ("the WG") set up a Task and Finish Group ("the Group") to assist in the preparation of proposed legislation on the question of domestic abuse. The Group's purpose, as identified in its Terms of Reference, was to "*inform the initial policy development and scope*" of the proposed bill. Its objectives were described in the Terms of Reference in the following terms:

> *"The main purpose of the Group will be to:-*
> *1. use their knowledge and expertise to support the policy lead in the development of the policy content of the Bill, including delivery and enforcement mechanisms, using the Impact Assessment as a framework*
> *2. use their networks to consult as widely as possible on policy content of the Bill and feedback to the Group*
> *3. provide and inform the commissioning (if appropriate) of a sound rationale and evidence base for any recommendations*
> *4. prioritise the issues to be addressed by the Bill"*

3. The Terms of Reference also included the following section:

> *"**Information Security***
> *The Group will treat all information discussed in the Group as restricted (policy in development) unless agreed otherwise with*

the [Senior Responsible Officer of the Bill] and in accordance with the letters of appointment."

4. The Group published a report on 24 August 2012 and on 26 November 2012 the WG issued a White Paper entitled "Consultation on legislation to end violence against women and domestic abuse". This was followed by a consultation period which ended on 22 February 2013.

5. The WG subsequently announced that it intended to bring forward an "Ending Violence against Women and Domestic Abuse Bill" although this had not happened by the time the parties were preparing their submissions on this appeal.

<u>The Request for Information and the Information Commissioner's Decision Notice in respect of it</u>

6. On 22 March 2013 the Appellant submitted an information request to the WG requesting "*Copies of the minutes of each of the meetings* [of the Group] *up to and including the 14 March 2013…".*

7. Section 1 of FOIA imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in the statute. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

   "in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

8. As the matter comes before this Tribunal the only requested information we are required to consider is the record of the Group's meetings.

9. The WG refused disclosure, a decision that it upheld following an internal review requested by the Appellant. The Appellant complained to the Information Commissioner about the way in which his information request had been handled. By the end of the Information Commissioner's investigation the exemptions relied upon by the WG to justify its refusal were those provided by the following sections of the FOIA:
   a. section 35(1)(a) (information relating to the formulation of government policy); and
   b. section 36(2)(b)(ii) and 36(2)(c) (information whose release would prejudice the effective conduct of public affairs).

10. In a Decision Notice dated 28 November 2013 the Information Commissioner decided that the requested information fell within the scope of the exemption provided by FOIA section 35(1)(a) and that the public interest in maintaining that exemption outweighed the public interest in disclosure. Having reached that conclusion he decided that it was not necessary to decide whether it would also have been exempt from disclosure under FOIA section 36.

11. For the reasons given below we have concluded that the Information Commissioner was correct in reaching the conclusion he did in respect of section 35 and that it is not necessary for us to consider whether the requested information was also exempt under section 36.

The Relevant Law

12. FOIA section 35 reads, in relevant part:

> *"(1) Information held by … the Welsh Assembly government is exempt information if it relates to-*
>
> *(a) the formulation or development of government policy…"*

13. Under FOIA section 2 the exemption under section 35 is categorised as a qualified exemption so that, if found to be engaged, the public interest test set out in paragraph [7] above must be considered before a decision is made as to whether or not the WG should have disclosed the requested information.

14. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

Is the exemption engaged?

15. The Appellant's position was not entirely clear on this point. At one point in his Grounds of Appeal he said:

> *"It is accepted that the policy formulation was live and ongoing at the time of my request"*

However, elsewhere in the same document he asserted that policy had been formed by then, the Group had been disbanded and all that was left to do was complete the "technical process" of drafting legislation.

16. In our view it is very clear from the summary of the Group's work set out above that the requested information related to the formulation of government policy. It is also clear from the sequence of relevant events we have summarised that the process of formulating policy was still underway (and indeed at quite an early stage) at the date when the request for information was submitted. Some of the Appellant's submissions seemed to indicate that he considered that the statutory test should have been applied at a later date, but it is clear from the statutory language that the assessment must be made at the date of the request in March 2013, just a few weeks after the end of the consultation period.

17. The Information Commissioner was therefore right to conclude that the exemption was engaged.

The public interest test

18. The Information Commissioner, in both his Decision Notice and his submissions to the Tribunal, conceded that there was a public interest in openness and transparency in the process of policy development. The Appellant argued that the general advantage of openness was supplemented by certain features of this particular case. He argued that the whole focus of the proposed legislation was altered during the course of the Group's deliberations from being gender neutral to being targeted towards violence visited upon women by men. It is certainly the case that the Group's terms of reference were headed "Domestic Abuse (Wales) Bill" whereas its report had the more specific title "Ending Violence Against Women and Domestic Abuse (Wales) Bill: Recommendations from the Task and Finish Group."

19. The Appellant argued that it was in the public interest that the process by which this perceived transition occurred during the Group's meetings should not remain secret. The WG and Information Commissioner pointed out that this Tribunal does not have any jurisdiction to consider the substance of government policy. That is undoubtedly true but it is nevertheless the case that there is a public interest in the approach adopted by government to gender balance in the context of domestic abuse and that information about the Group's deliberations might throw some light on it. However, we are satisfied that in this particular case the weight to be applied to this public interest factor is reduced by the fact that the issue of gender balance was addressed in the Group's report in sufficient detail to bring it to the public's attention. For example, the likely implications of terminological choices on public perception of the gender balance were recorded and the report included a section on male victims in the context of both heterosexual and gay/bi-sexual relationships, as well as a statistical analysis of victims, including children. The report contains no evidence that a concealed shift in emphasis occurred during the Group's deliberations. This is confirmed by our own review of the records which the Appellant seeks. We are satisfied, also, that ample

opportunity was given for an informed public debate on the subject both within and without the formal policy development process.

20. The Appellant supplemented his public interest arguments with two criticisms. First, he criticised the way in which an individual's contribution to the consultation process had been edited before publication by the WG. However, we are satisfied that this incident, which occurred after the Group's report had been published and involved a deletion having no direct bearing on its subject matter, carries no weight in the public interest balance we are required to carry out. Secondly, the Appellant accused the Group of not really being independent because each of its members had responsibilities to his or her employer and would have been unable to express personal views without creating an irreconcilable conflict of interest with their duties as employees. The WG argued that each individual had been appointed in order to contribute particular expertise and not to represent an organisation. We have seen no evidence in either the Group's report or disputed information to support the interpretation that members were acting on behalf of their organisation; rather they were independent specialists contributing on the basis of their experience. We therefore conclude that this criticism does not contribute anything to the public interest factors in favour of disclosure.

21. In his decision notice the Information Commissioner decided that the public interest in disclosure was outweighed by the public interest in maintaining the exemption. He considered that there was a strong public interest in protecting a safe space for the WG to be able to develop policy away from public scrutiny and that this applied to discussions within the Group, which needed to be free and frank and to be uninhibited in exploring all options.

22. The Appellant argued that the case for secrecy had been critically undermined by the fact that meetings of the Group had taken place before letters of appointment (which included express terms as to confidentiality) had been sent to Group members. Not all the facts relied on by the Appellant were accepted by the WG, but the reference to confidentiality in the terms of reference, in any event, made it quite clear to those attending Group meetings that they were taking part in a confidential process, whether or not the formal undertakings were completed by all members. This does not therefore dilute the public interest relied on by the WG.

23. We are satisfied that the public interest in maintaining the exemption carries considerable weight, particularly when viewed at the time when the request for information was submitted, and that it comfortably outweighs the public interest factors which the Appellant argued supported disclosure.

24. We conclude, therefore, that the WG had been entitled to refuse the request for information under FOIA section 35 and that the appeal

against the Information Commissioner's decision notice should therefore be dismissed.

25. Our decision is unanimous.

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Chris Ryan
Judge
16 July 2014