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IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2015/0320

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50515700
Dated: 2 December 2014

Appellant: John Cross

First Respondent: The Information Commissioner

Second Respondent: The Cabinet Office

Date of paper hearing: 4 August 2015

Venue: Fox Court

Before

HH Judge Shanks

Judge

and

Henry Fitzhugh and Narendra Makanji

Tribunal Members

Date of Decision: 14 August 2015

Subject matter:

Freedom of Information Act 2000

s.22	Qualified exemption: <i>Information intended for future publication</i>
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DECISION OF THE FIRST-TIER TRIBUNAL

- (1) The Tribunal allows the appeal in relation to section 22 of FOIA: the Information Commissioner was wrong to conclude that the Cabinet Office was entitled to rely on section 22 as a ground for refusing to disclose the requested information, ie the 1992 Precedent Book.
- (2) The Tribunal's consideration of the other FOIA exemptions relied on by the Cabinet Office is adjourned to an oral hearing to be held on the earliest suitable date that can be arranged (allowing two days).
- (3) The Cabinet Office is directed to instruct counsel to attend the hearing to assist the Tribunal on any point of law which arises and to arrange for the attendance of Roger Smethurst or an official of similar seniority to assist the Tribunal on any question arising on the factual background or the contents of the 1992 Precedent Book.
- (4) Although much of the hearing will of necessity be "closed" to him, the Appellant may attend the hearing which will be conducted in accordance with paragraphs 11 to 13 of the Tribunal Practice Note of May 2012. The Information Commissioner may attend by counsel or solicitor if he so wishes.
- (5) The Cabinet Office is to consider with counsel as soon as possible (i) whether any of the closed material already placed before the Tribunal ought to be disclosed to the Appellant and (ii) whether further information about the contents of the 1992 Precedent Book ought to be disclosed to him; and the Cabinet Office is to disclose any such information to him forthwith.

- (6) The Cabinet Office must by 4 September 2015 provide to the Tribunal:
- (a) a statement clarifying whether and to what extent they rely on any exemptions other than as shown on the Closed Schedule already provided (and in particular whether they rely on section 35 of FOIA in relation to Chapters 1 to 4 of the 1992 Precedent Book); and
 - (b) two copies of a new document for the use of the Tribunal members which sets out in full the words of the sections of the Precedent Book referred to in the Closed Schedule (or alternatively two additional copies of the full 1992 Precedent Book for their use).
- (7) The parties may apply to vary or add to these directions; any such application is to be referred to Judge Shanks if he is available.

REASONS FOR DECISION

The Precedent Book

1. This appeal concerns a document held by the Cabinet Office known as the Precedent Book. According to the statement of Lord Butler, who was the Cabinet Secretary from 1988 to 1998, the Precedent Book was created as "... a repository of important information on procedure and precedent ... [and as] a working guide to the whole field of Cabinet and Committee procedure and Ministerial Propriety ...". It includes historical notes and examples of past practice.
2. The Precedent Book was first created in 1954 and was revised in 1978, 1986 and 1992. The 1992 edition consists of twelve chapters bound in seven volumes. It has not been amended since 1992 save for some modest updates to Chapter 10 (which concerns memorial services) made in 2005. We are told by Lord Butler that there is only one working copy of the Precedent Book and it is held "... in a locked cupboard in a locked room in a secure corridor within 70 Whitehall ...". and that, although it

may be consulted from time to time, it is never removed from the Cabinet Office. There is no electronic version of the Precedent Book. According to Lord Butler, it has “ ... now largely been superseded by the Cabinet Manual ...” which was published in 2010 as a public document.

3. As we understand paragraph 21 of the revised (30 June 2015) statement of Roger Smethurst (who is a senior civil servant in the Cabinet Office and Head of Knowledge and Information Management) the 1954 edition of the Precedent Book was transferred to the National Archives subject to some redactions on an unspecified date before he made his statement and the 1978 and 1986 editions were each destroyed when the next edition came into existence, but some “notes on drafting and draft versions of several chapters” relating to the 1978 edition were transferred to the National Archives on an unspecified date and some “draft chapters and papers” relating to the 1986 edition are still held by the Cabinet Office.

The course of these proceedings

4. On 4 November 2012 the Appellant, Mr Cross, made a FOIA request to the Cabinet Office to provide him with “ ... an electronic copy of the most recent version of the Precedent Book.” The Cabinet Office responded by saying that it did not hold the information requested in electronic form but failed clearly to confirm or deny whether it held the information. In light of that unsatisfactory response and following a complaint by Mr Cross under section 50 of FOIA, the Information Commissioner directed the Cabinet Office in a decision notice dated 1 May 2013 to provide a fresh response to the request which was compliant with sections 1, 11 and 17 of FOIA.
5. That led to the Cabinet Office’s letter to Mr Cross dated 10 June 2013. The letter stated that the information was held by the Cabinet Office but that it was all being withheld from him because it was exempt by virtue of one or more specified FOIA exemptions set out in an annex to the letter. The main exemption relied on was that provided by section 22 (information intended for future publication). The letter stated:

The Precedent Book, subject to the redaction of certain exempt information as explained in the Annex to this letter, will be transferred to the National Archives in due course. As I have previously explained, the Precedent Book contained a large volume of information some of which is sensitive and needs to be considered fully before disclosure. Nevertheless considerable progress has been made and we expect the transfer to take place early in 2014.

In the Annex to the letter there was further reference to section 22. It was stated:

Most of the information you have requested is being withheld under section 22(1) of [FOIA] ... The file Precedent Book is being prepared for transfer to the National Archives under the Public Records Act. The file will be deposited in the National Archives and you will be able to consult it there. Arrangements for the transfer are at an advanced stage and I do not consider it would be reasonable in these circumstances to interfere with the preparations in order to disclose this information to you now.

The Annex also referred to sections 35 (formulation of government policy), 37 (communications with Her Majesty), 40 (personal information) and 41 (information provided in confidence) although it was not at all specific as to which information in the Precedent Book was said to be covered by these exemptions.

6. On 7 October 2013, following a review by the Cabinet Office which upheld the decision of 10 June 2013, Mr Cross again complained to the Commissioner under section 50 of FOIA. In response to various queries made in the course of his investigation the Cabinet Office wrote to the Commissioner on 7 May 2014. In relation to section 22 their letter stated:

On 13 June 2011 in its Interim Response to the Public Administration Committee's Eighth Report of Session 2010-12 the Government stated that "The Cabinet Office will review more recent versions [of the Precedent Book] and consider whether there should be a further release to the National Archives" ... While there is no recorded decision on whether to publish or not, this statement marked the official beginning of the process of preparing the retained Precedent Books (sic) for transfer to the National Archives. Although it was anticipated that some information would not be transferred it was also always expected that this would be a relatively insignificant proportion of the Precedent Books. The intention to publish was, and has remained, clear for some time prior to receiving this request.

As you note, the Cabinet Office's intention was to transfer this [1992] edition of the Precedent Book in early 2014. It remains our intention that this edition of the ... Book will be transferred to the National Archive within the next few months. For a number of reasons,

there has inevitably been some slipping from the original target date. This is mainly due to this and other FOI requests and, in addition, the fact that the Lord Chancellor's Panel, which require to approve any proposed retention of Precedent Book information by the Cabinet Office, only sits quarterly. As a result, while some of the relevant information may be transferred before June [2014] it is unlikely that the whole of the information will be transferred before then.

The letter also set out the Cabinet Office's case on the previously mentioned exemptions and stated that section 27 (international relations) was also relied on in respect of unspecified passages in the Precedent Book.

7. On 2 December 2014 the Commissioner issued the decision notice which is the subject of this appeal. The notice stated that the Cabinet Office was entitled to rely on the exemptions in sections 22 (information intended for future publication), 35 (formulation of government policy), 37 (communications with Her Majesty), and 41 (information provided in confidence) to withhold the Precedent Book, but gave no detail as to which information was covered by which exemption. The Commissioner stated that in view of his decision on the other exemptions he had not considered section 27 (international relations) or 40 (personal information).
8. On 27 December 2014 Mr Cross appealed against that decision notice; his grounds of appeal raised issues in relation to section 22 (information intended for future publication), 35 (formulation of government policy), 37 (communications with Her Majesty), and 41 (information provided in confidence).
9. The Cabinet Office was joined to the appeal and provided a Response dated 20 March 2015 stating that it supported the decision notice and would also seek to rely on sections 27 (international relations) and 40 (personal data). In open submissions dated 17 July 2015 the Cabinet Office also stated that "... during the course of closer scrutiny and review of the vast amount of information in issue ..." they had identified yet further exemptions they wished to rely on in relation to some limited items of information, namely sections 24 (national security), 35(1)(d) (operation of a ministerial private office; not previously relied on under section 35), 38 (health and safety) and 42 (legal professional privilege). In a (closed) schedule provided to us

along with a Closed Annex to those submissions it appears that the Cabinet Office is also now seeking to rely on section 34 (parliamentary privilege) in relation to one passage in the 1992 Precedent Book.

10. All parties consented to the appeal being dealt with on the papers. It is not clear what (if any) consideration was given to the question whether that procedure was appropriate as required by rule 32(1)(b) of the rules of procedure but in any event the case was listed before us on 4 August 2015 for a “paper hearing.” We were provided with an Open Bundle which included redacted versions of Lord Butler’s statement and the letter to the Commissioner dated 7 May 2014 and two versions of Mr Smethurst’s statement (dated 5 June and 30 June 2015 respectively) and with a Closed Bundle which contained unredacted versions of Lord Butler’s statement and the letter of 7 May 2014 and the Closed Annex and schedule mentioned above. We were also provided with one copy of the 1992 Precedent Book itself on a closed basis.

Section 22

11. We first consider the issues arising on section 22 of FOIA which in our view we can properly determine without an oral hearing.

12. The section provides that information is exempt if:

- (a) **the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not)**
- (b) **the information was already held with a view to such publication at the time when the request for information was made, and**
- (c) **it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).**

The exemption is “qualified” meaning that, in order for it to apply, there is an additional requirement that in all the circumstances the public interest in maintaining the exemption outweighed the public interest in disclosing the information. We do not believe that there can be any dispute that in order for the exemption to have applied in this case two conditions had to be satisfied:

- (1) that by 4 November 2012 and throughout 2013 the Cabinet Office had a “clear and settled” intention that the 1992 Precedent Book would be published at some future date;
- (2) that, looking at all the circumstances as they were in 2013, it was reasonable and on balance in the public interest to withhold disclosure until such publication.

We consider these two conditions in turn.

(1) The Cabinet Office’s intention

13. The Cabinet Office’s case is in effect (a) that it had a clear and settled intention to transfer the 1992 Precedent Book to the National Archives which was formed some time before 4 November 2012 and (b) that transfer to the National Archives is tantamount to publication. On the assumption that (b) is correct as a matter of law, it is necessary for the Tribunal to consider the evidence in relation to (a).

14. We have already referred to the statement made by the Government on 13 June 2011 that the Cabinet Office would “... review more recent versions [of the Precedent Book] and consider whether there should be a further release to the National Archives.” We can only assume from the terms of the statement that at that stage the 1954 version of the Precedent Book had already been transferred to the National Archives and that the reference to “more recent versions” must have been a reference to the 1978, 1986 and 1992 editions. Mr Smethurst’s evidence is that this statement “... marked the official beginning of the process of preparing the retained Precedent Books for transfer to [the National Archives]” and that the Cabinet Office’s intention was that the 1992 version of the Precedent Book would be transferred in early 2014. It is accepted by the Cabinet Office that, other than the statement of 13 June 2011, there is no contemporaneous document confirming that evidence.

15. In his original statement (dated 5 June 2015) Mr Smethurst said that the 1978 edition of the Precedent Book was transferred to the National Archives some time after 13 June 2011 and that the normal procedure would then have been that the 1986 edition would be reviewed, there would be consultations with “stakeholders”, redaction as

appropriate and then transfer to the National Archives. He said that this process had been interrupted because Mr Cross's appeal (which we note did not start until December 2014) had required the Cabinet Office to start reviewing the 1992 edition of the Precedent Book before the 1986 edition had been reviewed.

16. In his revised statement, as we have already noted, Mr Smethurst states that the true position was that the 1978 edition had not in fact been transferred to the National Archives and that both it and the 1986 edition were destroyed when the next edition came into existence. The revised statement says that the six files containing notes on drafting and draft versions of several chapters relating to the 1978 edition were transferred to the National Archives at some unspecified time and that the Cabinet Office “... *intends to facilitate* transfer of the 1986 Precedent Book draft chapters and papers as soon as possible” (we are not clear what exactly the highlighted words are intended to convey). It goes on to say that Mr Cross's appeal had interrupted the process of review and transfer of the “1986 papers” (rather than the 1986 edition of the Precedent Book as previously asserted).

17. So far as the 1992 edition of the Precedent Book is concerned, both statements say that there is a great deal of personal information in Chapter 6, and that other chapters contain information that is not only personal but “extremely sensitive”, in particular Chapters 5, 10, 11 and 12. It is said that before the 1992 edition can be transferred to the National Archives there will need to be checks on whether people are still alive and whether it will be unfair to process their personal data and consultations with the Royal Household and other “relevant stakeholders” and that a time-consuming process of redaction will be required. Although Mr Smethurst says that the Cabinet Office's intention was to transfer the 1992 edition of the Precedent Book in early 2014 (ie almost a year before the decision notice and appeal in this case) and says that it is still the Cabinet Office's intention to do so as soon as possible it is clear from his statements that nothing has yet been done by way of consulting the relevant stakeholders or applying redactions.

18. In the face of this unsatisfactory evidence (which, in fairness to him, the Commissioner did not have) we can only conclude that in reality nothing of substance has been done about transferring any version of the Precedent Book to the National Archives since the statement of 13 June 2011, that the letters of 10 June 2013 and 7 May 2014 are misleading in various ways, and that the Cabinet Office has simply been involved in a “fire-fighting” exercise in relation to FOIA requests designed to put off making decisions on the Precedent Book for as long as possible. In the circumstances we cannot infer that the Cabinet Office had a clear and settled intention to transfer the 1992 edition of the Precedent Book (or even a substantial part of it) to the National Archives in 2012; at most, they had a vague intention (as reflected in the statement of 13 June 2011) at some stage to look at any post-1954 editions of the Precedent Book they might still be holding and then to decide whether to make a further transfer of something then unspecified to the National Archives.

19. We therefore conclude that the condition as to the Cabinet Office’s intention was not satisfied on the facts and that for that reason they could not properly rely on section 22. In the light of that conclusion we have not needed to reach a final view on what we consider to be a moot point of law as to whether transferring information to the National Archives is tantamount to its publication. (There are a number of statutory provisions which seem to us potentially relevant to this issue, in particular sections 2(3), 2(4), 3(1), 3(4) and 5(3) of the Public Records Act 1958 and sections 15 and 62 to 67 of FOIA).

(2) All the circumstances

20. Strictly speaking it is also unnecessary for us to consider the second condition we identify in paragraph 12 above. However, we have reached the firm view that, even on the assumption that the Cabinet Office did have a clear and settled intention in 2012 and 2013 that the 1992 Precedent Book would be published at some date in the future, looking at all the circumstances as they were in 2013, it was not reasonable or in the public interest to withhold disclosure until that date. We reach that view having regard on the one hand to the very clear and strong public interest in the disclosure of the document in question and, on the other, to the fact that, on any view, the evidence

indicates that any intention to transfer the document to the National Archives was not one which was going to be achieved for some years to come. And, for reasons that will be obvious from our account of the evidence, we are not at all impressed by any suggestion that Mr Cross's FOIA request somehow had the affect of disrupting an orderly and timely transfer of the 1992 Precedent Book to the National Archives.

21. We therefore conclude on this ground also that the Cabinet Office was not entitled to rely on section 22 and that the Commissioner was wrong to decide that it was. For that reason, as well as the reason set out in paragraphs 18 and 19 above, we would allow the appeal on section 22.

Other exemptions relied on

22. We have described in paragraphs 5 to 10 above the way in which the Cabinet Office has introduced the various other exemptions relied on and the procedural history of the appeal. We are now faced with a position where we have just one copy of a substantial document apparently containing many relevant passages from which to work, where we do not know to what extent certain exemptions are relied on (and in particular whether section 35 is relied on in relation to Chapters 1 to 4) and where we are not assisted by the public authority in a case where, among other things, section 24 (national security) is relied on. Further, we are concerned that the procedure adopted so far may not be fair to Mr Cross in that it may be that further information should have been supplied to him.
23. In all the circumstances we do not feel in a position to make a decision on the other exemptions at the moment and we are also of the firm view that we cannot properly decide the balance of the appeal without an oral hearing. We therefore make the directions contained at paragraphs (2) to (6) of our decision above pursuant to our case management powers under the rules of procedure. Given the very substantial delays that have already occurred in this case we would hope that the oral hearing can take place in the next few months and we would expect the Cabinet Office to use its very best endeavours to achieve that.

Appeal No: EA/2015/0320

HH Judge Shanks

14 August 2015