IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/0030**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50547904
Dated: 16 December 2014

Between

The Home Office

Appellant

and

The Information Commissioner

First Respondent

and

Alistair Sloan

Second Respondent

Date of Hearing: 30 June 2015

Before

David Farrer Q.C.

Judge

and

Marion Saunders and **Mike Jones**

Tribunal Members

Date of Decision: 11 July 2015

Date of Promulgation: 20 July 2015

Attendances:

For the Appellant Akhlaq Choudhury
For the First Respondent Julianne Kerr Morrison
The Second Respondent appeared in person.

Abbreviations:

The HO	The Appellant.
The ICO	The Information Commissioner.
AS	The Second Respondent
The DN	The ICO's Decision Notice dated 16th December, 2014.
FOIA	The Freedom of Information Act, 2000

Decision

The Tribunal finds that the public interest favours disclosure of the requested information which remained in issue when this appeal was lodged, save in so far as it includes the personal data of HO officers and a suspected offender. It therefore orders that such information be disclosed to the Second Respondent within 28 days of the date when this Decision is served on the Appellant. The Closed Annex to this Decision shall be published 28 days from that date, unless, within that 28 - day period, an application has been made for permission to appeal against this Decision.

Subject Matter

FOIA s.36(2)(b)(i) and (ii) Whether the public interest in maintaining the free and frank provision of advice and exchange of views within the HO and promoting the use of social media by the HO outweighed the public interest in disclosure of the requested information.

Authorities

Department of Health v ICO and Lewis [2015] UKUT 0159 (AAC).
Office of Government Commerce v IC and HM Attorney General on behalf of the Speaker of the House of Commons [2008[EWHC 638 (Admin.)

Reasons for Decision

The Background

1. On 1st. August, 2013 The HO conducted a wide - ranging series of arrests of suspected illegal immigrants, Operation Compliance.

2. Some time beforehand, a decision was taken that the operation should be reported by a series of tweets, accompanied by photographs and video footage, as it proceeded. This would have the advantage of publicising this enforcement action to an audience that did not always use more traditional media channels.

3. Operation Compliance divided public opinion. provoking considerable opposition, expressed in the press and in social media. It was undertaken at a time when H.O. handling of the problem of illegal immigration to the UK was attracting substantial public interest, resulting partly from a publicity campaign using vans displaying prominent warnings as to the penalties for remaining in the UK illegally.

4. It became apparent that the use of Twitter to promote awareness of HO enforcement action on 1st. August, 2013 was, of itself, a controversial initiative, leading to widespread opposition in the form of tweets and comment in the media, some expressing or implying suspicions of racial discrimination. How far such reactions represented UK public opinion as a whole is impossible to assess and irrelevant to the Tribunal's task. What is clear, on the evidence submitted to the Tribunal, is that both the execution and

contemporaneous HO tweeting coverage of Operation Compliance aroused considerable public interest.

The Request

5. On 7th. August, 2013, six days after the operation, AS made the following request to the HO.

"The information relates to arrest of suspected immigration offenders on 1 August, 2013.

(1) On the relevant date, how many individuals were stopped and checked on suspicion of being immigration offenders ?

(2) Please provide, for the relevant date, the nationalities of those at (1), together with the number of persons stopped of each nationality.

(3) Please provide the content of any information held relating to the Home Office's tweets of the 1 August, 2013. This part excludes all tweets as they are already available in the public domain.

This exclusion plainly relates to the sequence of tweets made by the HO on 1st. August accompanying the arrests.

6. It is unnecessary to detail the history of HO responses to these requests. Suffice it to say that Requests 1, 2 and 3 were in due course complied with, subject to preserving the anonymity of individuals where the numbers were so small that the identity of individuals might be inferred by those with further knowledge of the events of 1st. August and that some emails or extracts from emails responsive to (4) were disclosed before the issue of the DN. The HO was, however, late with its initial response and guilty of deplorable delay in its internal review of its refusal.

7. As to the information within request 4, which gives rise to this appeal, the HO, in its response to AS's request for an internal review, relied on the qualified exemption in FOIA s.36(2)(b)(i) and (ii), namely the contention that disclosure would inhibit the free and frank provision of advice and exchange of views

within the HO. That exemption was considered in the DN, together with s.40(2) relating to protection of the personal data of both civil servants and persons encountered or arrested during the operation. The only issue on appeal is the application of s.36(2)(b); the duty to protect personal data is agreed.

The DN

8. The ICO accepted that the exemption had been cited on the basis of an opinion of a minister and that that opinion was reasonable. So the exemption was engaged. He proceeded to review the competing interests in disclosure and withholding of the requested information, which represents most of the content of the emails exchanged by HO personnel on and before 1st. August, 2013. A strong argument for disclosure, he concluded, was the particular public interest in Operation Compliance, which went beyond the considerable concern over immigration issues in general. He acknowledged that the request was made very soon after the exchanges of emails took place but considered that the degree of inhibition on future discussion would not be severe. He described the character of the withheld emails as “benign”. The fact that the HO had been generally open on issues relating to immigration policy did not alter the balance. He decided that the balance of public interests required disclosure.

9. The HO appealed.

The Issues and submissions on appeal

10. The issue is whether the public interest in maintaining the exemption provided by s.36(2)(b) outweighs the public interest in disclosure of the requested information, since this is an exemption to which FOIA s.2(2)(b) applies. The Tribunal judges this issue afresh on all the material before it. As emphasised at the hearing, detailed refutation of the ICO’s reasoning in the DN is of limited value, except in so far as it deals with the substance of the public interests engaged.

11. No oral evidence was called at the hearing. All parties made oral submissions, enlarging on the written arguments already served.

12. A short closed material session took place. The Tribunal invited AS to indicate if there were particular matters that he wished it to raise, if appropriate, in his absence; there were none. No evidence was received apart from the requested information itself. The Tribunal members posed a number of questions in response to HO submissions. The ICO responded to those submissions. When the open hearing resumed the Tribunal gave AS a brief account of the nature of the closed material session without disclosing the content of the withheld information. A short Closed Annex, referring to the content of that information, accompanies this Decision.

The case for the HO

13. In its essentials this can be quite briefly summarised. Blunt and challenging debate within a government department on issues of policy and presentation is essential to good government. Such debate will be or is likely to be stifled by the threat of premature disclosure at a time when the conduct of an initiative or the formulation of policy is still a live issue. This argument is commonly labelled “the need for a safe space”. The need is acknowledged to diminish with the passage of time but, in this case, the request for disclosure of the exchanges could scarcely have been more immediate.

14. The tackling of illegal immigration is an exceedingly sensitive issue, which is shown by a long series of opinion polls to be of great, if not paramount public concern. This is, of course, a double - edged argument but it is deployed by the HO as evidence of the risk of inhibition, the so - called “chilling effect”, frequently asserted by government departments.

15. At the hearing Mr. Choudhury further argued that the premature disclosure of preliminary discussions on the conduct of the tweeting exercise threatened the future use of such a tool, hence the loss of a valuable channel of communication with the public, especially younger people who derive more information from tweets and blogs than long - established media. He

questioned whether the information sought was entirely “benign”, if that meant anodyne. Again this submission cuts both ways, as he accepted.

16. He submitted that the inhibiting effect was much greater when, as requested here, disclosure would have closely followed the exchanges.

17. He questioned how far disclosure would inform public understanding of the relevant issues, given both the content of the requested information and the breadth of information that the HO had freely disclosed.

18. Our attention was drawn to *Department of Health v IC and Lewis [2015] UKUT 0159 (AAC)* and the principles governing the proper judgement of the public interest. Specifically, the HO relied on the emphatic disapproval of a class - based approach to information (see para. 20). Each determination is specific to the facts of the case. There is no presumption as to disclosing or withholding inherent in the category of information. That applies equally to both sides of the argument. Public interests relevant to the balancing exercise are interests of demonstrable practical consequence, not “high - level” theoretical matters of policy.

<u>The ICO’s submissions</u>

19. Ms.Kerr Morrison relied on the general interest in transparency, the greater where the actions of central government are involved. She also referred us to the *DoH* case. There was a keen public interest in understanding how the HO tweets were formulated, hence the approach to the wording used. The content of the withheld material could contribute to that understanding. These were not, for the most part, tweets made under the pressure of events on 1st. August but during the period of preparation over the preceding two weeks. The public was entitled to assess whether the tweeting crossed the line between the proper conduct of government and the promotion of a partisan political agenda. (Given the role of the civil service in implementing government policy, that line may be difficult to identify, let alone trace in a particular case.)

20. On the question of timing, she argued that disclosure was of more value to the public when made whilst the relevant issue was topical. Information revealed only months or years after public interest had subsided lost much of its impact.

The submissions of AS

21. AS presented his case with skill, economy, fairness and restraint. He highlighted the importance of observing just how the HO "put itself across to the public", given its public relations campaign against immigration offenders as exemplified by the van poster initiative. He reminded us of the words "in all the circumstances" applied to the public interest balance in s.2(2)(b). That required the public authority to have regard to the context of the HO discussions in question. The public interest must be approached on a case by case basis. We were referred to *Office of Government Commerce v IC and HM Attorney General on behalf of the Speaker of the House of Commons [2008[EWHC 638 (Admin.)* at para.71 as to the inbuilt interest in public access to information held by public authorities.

22. He supported his case with evidence as to the public interest and criticism both of Operation Compliance and the associated tweet commentary contained in tweets, blog posts and subsequent articles in the press. It included photographs of arrests which were appended to the HO tweets. He argued that such evidence demonstrated public concern over both elements of HO activity on 1st. August. He argued further that the HO breached guidelines contained in "Social media guidance for civil servants", published in 2012.

Our reasons

23. FOIA s. 36(2)(b) reads as follows -

"(2)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, - - -

S.36(5) provides that, in relation to information held by a government department, "a qualified person" means a minister of the Crown.

24. There is no dispute that the opinion was that of a minister of the Crown and that it was reasonable. That it was reasonable does not mean that it was correct, still less that the public interest favours withholding the information. Those are matters for the Tribunal.

25. It is therefore accepted that the exemption is engaged. The issue for the Tribunal is the balance of public interests.

26. There is no factual dispute in this appeal and no evidence, oral or written from witnesses for any of the parties. The Tribunal knows that there was a wide - ranging HO operation on 1st. August, 2013 resulting in the arrest of around 130 suspected immigration offenders (The exact number is immaterial) and that it followed other highly publicised HO activity designed to demonstrate an energetic determination to tackle illegal immigration to the UK. It is plain that such activity provoked concerns as to the methods adopted and the possibility that it involved racial profiling. Whether or not such concerns were justified is not a matter for the Tribunal.

27. To accompany Operation Compliance the HO planned a series of tweets and linked visual material to inform the public of what was being done as it happened. It is equally beyond dispute that the use of social media for this purpose and using the particular words and images tweeted aroused considerable interest, much of it hostile.

28. This was not the first use of this medium of communication by a government department and, the Tribunal accepts, the HO contemplated its future use as a means of communicating with the vast audience offered by social media.

29. Such is the undisputed factual background to our decision.

30. In its approach to determining where the public interest lies the Tribunal has regard to the guidance provided by Charles J. in *DoH v ICO and Lewis.* What must be considered is not the class of document or information but its content in the instant case. The prejudice to be considered is the harm that will or is likely to result from disclosure of the particular information, here the redacted or wholly withheld emails exchanged by civil servants which result. By the same token, the benefit to be assessed is that which public debate will or may well gain from full disclosure of those emails (see para. 23).

31. When assessing arguments relating to the need for candour, "safe spaces" and "chilling effects", we must bear well in mind that any informed civil servant taking part in discussions knows that his/ her contribution may be disclosed to the public if the public interest requires it and that the greater the public interest the more likely such disclosure. This consideration may tend to weaken the force of such arguments. (see paras. 27 and 28).

32. The principal prejudice said to result or be likely to result from disclosure is not harm to Operation Compliance or its presentation to the public but the effect on civil servants of knowing that exchanges of ideas and opinions on how to tweet news of HO activity or similar communications may be exposed to the public very shortly afterwards whilst public interest is still intense. In closed session the Tribunal's attention was drawn to a few matters said to exemplify HO concerns. They are dealt with in the annex.

33. The other possible harm is said to be the abandonment by the HO of tweeting as a means of informing the public. We can deal with that quite shortly. It was first raised in the course of oral submissions at the hearing. There was no evidence on the point, though evidence could easily have been adduced, if such a step was contemplated following an unfavourable decision by the Tribunal. In any event, such a decision is the free choice of the HO, influenced perhaps but certainly not determined by the Tribunal's decision. We do not regard this as a substantial reason for withholding the information.

34. The prejudice identified at paragraph 32 above does not, in our opinion, involve safe spaces for discussion of policy or presentation. Disclosure on the date of the request could not interfere with the presentation of Operation Compliance, which was over and done with.

35. The HO's case relates rather to the supposed effect on future debate within the Department. It is therefore appropriate to take account of the potential weakness in such an argument identified in *DoH v ICO and Lewis* and referred to at paragraph 31 above. Civil servants planning tweet programmes in the future will be well aware of the possibility of disclosure, regardless of our decision.

36. There is no evidence of this chilling effect on future discussions; it is left to inference. Such an inference is, however, far from compelling. It is not suggested that the authors or addressees of particular emails should be identified. Since robust exchanges of view are the objective of withholding the information, it is hard to see why civil servants should be cowed by the thought that such evidence of good administration should be revealed to the public, save where matters of great sensitivity are involved. That is not this case. The emails withheld include some matters of interest but nothing, revelation of which would alarm those reflecting on possible disclosure of future exchanges.

37. The Tribunal does not accept that the timing of the request strengthens the HO's case. It would certainly be relevant if it were intruding in the "safe space" required for formulation of policy, including policy as to presentation. That was not the case. It followed very shortly after the completion of the arrest operation and the accompanying tweeting exercise. It is hard to see why civil servants should be more gravely inhibited by the thought that discussions of - by the time of the request - past events could be disclosed promptly rather than after some delay.

38. To summarise, the Tribunal concludes that little, if any inhibition of future debate would result from disclosure of this information. It assesses the public interest in withholding this information as slight at best.

39. We turn to an assessment of the public interest in disclosure.

40. How a major department of state presents its policy on a major issue to the public is a matter of significant public interest, particularly where opinions as to its merits differ sharply. Illegal immigration and how it should be dealt with are issues that provoke very great public interest and concern. The plan to prepare a series of tweets and visual images to accompany Operation Compliance was bound to arouse considerable interest since it involved reporting on a highly significant and controversial event by the instigator of that event with a view to communicating its case for acting as it did to the public. It was a more immediate and far more vivid means of communication than the traditional press release or ministerial interview on Radio 4.

41. The Tribunal has looked closely at the requested emails. They include a considerable amount of repetitive material and, rather oddly, information already in the public domain. They provide nothing startling or dramatic, in the Tribunal's opinion, but feature some emails which could inform public opinion as to the way in which HO personnel prepared for the tweeting operation. Ideas that were discarded or simply never realised during the operation may be valuable to public understanding. The same applies to indications that civil servants have or have not paid attention to proper protection of personal data.

42. Given the importance of the subject matter, we assess the public interest in disclosure as significant. As to timing, that interest might have been best served, if it prevailed over those that favoured maintaining the exemption, soon after the date of the request, when these matters had a higher profile in the news.

43. It follows that, in our judgement, the public interest in disclosure, whilst not overwhelming, clearly outweighs the public interest in withholding this information.

44. For these reasons we dismiss this appeal.

45. This decision is unanimous.

David Farrer Q.C.

Tribunal Judge

11th. July, 2015