



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

Appeal Reference: EA/2016/0146

**Heard at Fleetbank House, London EC4Y 8JX
On 23rd November 2016**

**Before
CHRIS RYAN
MELANIE HOWARD
NARENDRA MAKANJI**

Between

LIAM O'HARE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

And

THE SCOTLAND OFFICE

Second Respondent

Attendances:

The Appellant appeared in person
For the First Respondent: Zoe Gannon of Counsel
For the Additional Party: Heather Emmerson of Counsel

DECISION AND REASONS

1. The appeal against the Information Commissioner's Decision Notice FS50592552 of 31 March 2016 is dismissed.

Background Facts

2. On 4 April 2015, during the 2015 General Election campaign, the Daily Telegraph published the text of what it described as the British Government's account of certain meetings which the French ambassador had attended during a visit to the Scottish Parliament in late February or early March of that year. The meetings had included one with the Scottish National Party leader Nicola Sturgeon and the article stated that she had expressed a preference for one leader of a UK political party over another. We will refer to the document mentioned by the Daily Telegraph as "the Memorandum".
3. On 8 April 2015 the Appellant asked the Scotland Office to disclose the Memorandum as well as any documents "relating to" it. The Appellant also asked for a further class of documents, but it is now accepted on all sides that no documents exist that fall within the scope of that part of the request.
4. The effect of the request was to invoke section 1 of the Freedom of Information Act 2000 ("FOIA"), which 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 FOIA.
5. Although the Scotland Office should have responded to the information request within 20 working days (as required by FOIA section 10) it was not until 15 June 2015 that it confirmed that it held information relevant to the request, but that it refused disclosure on various grounds.
6. By the date of that refusal the Cabinet Office had published (on 22 May 2015) the outcome of its inquiry into the leak of the Memorandum. It concluded that the Memorandum had been leaked by Euan Roddin, who at the time was a Special Adviser to the then Secretary of State for Scotland, Alistair Carmichael. It concluded, too, that Mr Carmichael had agreed to the leak being made. It also recorded that it had no reason to doubt that the Memorandum's author had recorded accurately what he thought he had heard and that there was no evidence of the author having been politically motivated or having engaged in "dirty tricks".

7. Subsequently Ms Sturgeon denied that she had said what had been reported regarding other party leaders and the French Ambassador issued a statement supporting her denial. The Memorandum itself noted the possibility that something in the conversation may have been “lost in translation”.

The Information Commissioner’s investigation of the refusal to disclose and the Decision Notice issued at the end of the investigation

8. The Scotland Office’s refusal to disclose, (which it maintained following an internal review), was referred to the Information Commissioner by the Appellant, who complained about how his information request had been handled.
9. On 31 March 2016 the Information Commissioner, having completed his investigation, issued the Decision Notice which gives rise to this Appeal. He determined that the Scotland Office was not required to disclose either the Memorandum or the bulk of the other relevant documents it held. Those documents consisted of:
 - a. written communications between the author and those to whom he sent a copy of the Memorandum at the time he wrote it; and
 - b. the further communications, between a wider group of people, which came into existence once the Daily Telegraph had published its article and an investigation into the leak had been commenced.
10. The Information Commissioner decided that the Memorandum and some parts of the other documents fell within the exemption provided by FOIA section 27(1)(a) (disclosure would prejudice relations between the UK and another State) and that the public interest in maintaining that exemption outweighed the public interest in disclosure.
11. The Decision notice also decided that certain parts of the other documents should be disclosed, subject only to the redaction of the names and job descriptions of civil servants, both junior and senior, identified in the documents. This was on the basis that the identifying information fell within the exemption provided by FOIA section 40(2) (third party personal data).

The Appeal to this Tribunal

12. On 29 May 2016 the Appellant appealed to this Tribunal. His Grounds of Appeal recorded that he objected to the Information Commissioner’s application of both section 27(1)(a) and section 40(2). On section 27 he argued

that “*disclosure of accurate details of the meeting would not harm France-UK relations*” and that any harm that had occurred was the result of the leak of an inaccurate document. During the course of the hearing of this Appeal the Appellant clarified his position on this issue. He did not suggest that other versions of the Memorandum existed, which might provide a more accurate record of the conversation in question. Rather, he was saying that, given all the confusion surrounding the part of the conversation which touched on other party leaders (in particular the denials referred to above), the official copy of the Memorandum should have been put into the public domain. We interpret the argument, put in that way, as having relevance to the public interest balance we must perform if we decide that the exemption is engaged.

13. As to section 40, the Appellant accepted that the identities of junior members of staff should remain confidential, but argued that people in positions at the Scotland Office, such as the Minister, Junior Minister, Special Advisor or Senior Civil Servant should have a reasonable expectation that their activities would be subjected to public scrutiny. Accordingly, he argued, their names should not be redacted before disclosure. During the course of the Appeal the Appellant made it clear that the identities he sought were those involved in any way with the Memorandum up to the time of the leak. He was not concerned with those named or otherwise identified in documents that came into existence after that time (and therefore relating to the establishment or conduct of the leak inquiry). Concessions were also made by both the Information Commissioner and the Scotland Office on other elements of the withheld information that did, or might have, identified individuals. This further reduced the extent of the withheld information on which FOIA section 40(2) had potential impact, leaving us to decide just the point of principle as to whether or not, on the facts of this case, the exemption should extend to include senior civil servants or special advisers.
14. The Scotland Office was added to the Appeal as Second Respondent under a Case Management Note dated 14 July 2016 and both the Information Commissioner and the Scotland Office filed written Responses. The Information Commissioner’s Response effectively invited us to approve the Decision Notice, for the reasons set out in it. The Scotland Office supported the arguments of the Information Commissioner, but stated that, if the Tribunal adopted a different view in relation to either or both of the exemptions which the Information Commissioner had found to have been engaged, then it would wish to rely on section 27(2) (confidential information from a foreign government), 31(1)(g) (law enforcement) and section 38(1) (danger to health or safety).

15. The withheld information was made available to us on a closed basis, meaning that it was not made available to the Appellant. This was for the obvious reason that disclosure would pre-judge the issues we have to consider. We also received closed and open witness statements from three civil servants with relevant experience. These were Philip Rycroft (who addressed the likely impact of disclosure on the individuals affected), Ben Aung (who provided contextual information about the leak inquiry) and Christopher Sainty (who addressed perceived diplomatic consequences).
16. Mr Rycroft is Second Permanent Secretary, Head of UK Governance Group in the Cabinet Office. Much of his witness statement consisted of nothing but opinion and argument in support of the case put forward by the Scotland Office. He did, however, provide some background information and set out the reasons why he feared that disclosure of the identities of relevant individuals would undermine their privacy and put them at risk.
17. Mr Aung is the Head of Government Security, Cabinet Office. He explained that the scope of the information request extended to communications that came into existence during the course of the investigation. The published report of the outcome represented a departure from normal procedures under which no report is issued, and no comment made, on the content of any leaked document.
18. He explained that it was unusual for a leak inquiry to have been given as much publicity as in this case, which arose from the sensitivity of the subject matter during the course of an election campaign. This represented a departure from the normal policy of not commenting on the contents of allegedly leaked documents. He explained that to go further and disclose materials that threw light on the investigatory techniques adopted by those undertaking an inquiry would risk placing valuable information into the hands of anyone contemplating leaking information in the future. Information that might educate them into how to avoid detection in the future. He said more about the precise techniques he had in mind in this context during a closed session of the hearing.
19. Mr Sainty is the UK's European Correspondent and Head of the External, Western and Southern Europe Department, in the European Directorate, Foreign and Commonwealth Office. He described his role as the UK's focal point for EU Common Foreign and Security Policy matters and explained that it required regular and close professional conduct with French and other European counterparts. The essence of his evidence (ignoring those parts of it where he set out his views on legal issues which it is for the Tribunal and not government officials to determine) focused on the damage he feared would be

caused to the relationship between France and the UK if the withheld information were to be disclosed.

20. Neither Mr Aung nor Mr Sainty was in their current posts at the time of the relevant events. The extent to which they were able to help the Tribunal was therefore limited, particularly in the case of Mr Sainty who informed us during the hearing that he had not obtained information from colleagues about the response of the French Government to the Daily Telegraph article. His evidence on the section 27(1) exemption consisted largely of speculation, therefore.
21. We touch further upon the evidence of the three witnesses where it is relevant to our determination of the matters in dispute.

The relevant law

22. FOIA section 1(1) provides:

*“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”.*

23. That obligation of disclosure is subject, for the purposes of this case, to section 2(2), which reads:

*“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –
(a) the information is exempt information by virtue of a provision conferring absolute exemption, or
(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

24. The main exemption, which the Information Commissioner decided was engaged, was section 27(1), which reads:

*“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –
(a) relations between the United Kingdom and any other State...”*

25. In relation to the individuals who would be identified if the withheld information were to be disclosed the Information Commissioner applied section 40(2). This provides that information is exempt information if it

constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles.

26. Personal data is itself defined in section 1 of the Data Protection Act 1998 (“DPA”) which provides:

“‘personal data’ means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller”

It is accepted on all sides that the name and job titles of each of the individuals named in the withheld information does constitute personal data.

27. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

“Personal data shall be processed fairly and lawfully, and in particular shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met ...”

Schedule 2 then sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

The term “processing” has a wide meaning (DPA section 1(1)) and includes disclosure.

28. A broad concept of protecting individuals from unfair or unjustified disclosure (in the event that their personal data has been publicly requested) is a thread that runs through the data protection principles, including the determination of what is “necessary” for the purpose of identifying a legitimate interest. In order to qualify as being “necessary” there must be a pressing social need for it - *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).

29. The additional exemptions on which the Scotland Office relies are the following:

Section 27(2):

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom ...”

Section 31(1)(g):

“(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would or would be likely to, prejudice –

...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

(2) The purposes referred to in subsection (1)(g) ... are-

...

(b) The purpose of ascertaining whether any person is responsible for any conduct which is improper

...”

Section 38(1)

(1) Information is exempt information if its disclosure under this Act would, or would be likely to –

(a) Endanger the physical or mental health of any individual, or

(b) Endanger the safety of any individual.”

30. All of the exemptions relied on, with the exception of section 40, are qualified exemptions, requiring the application of the section 2(2)(b) public interest balance in each case. We will deal with each exemption in turn, considering both the application of the exemption and, if engaged and where appropriate, the public interest balance:

Section 27(1) – prejudice to relations with another state

31. As we have indicated, the Appellant’s case focused on the desirability of the official copy of the Memorandum being put into the public domain in light of the uncertainty created by the leak, the denials and the outcome of the leak inquiry. He acknowledged that confidentiality was important in diplomatic exchanges, but argued that the issue must be looked at differently once information has reached the public domain by other means. Any harm to

diplomatic relations, he said, had already been caused by those in authority allowing the leak to occur. No significant further harm would be caused by disclosure under FOIA.

32. Mr Sainty's evidence, under questioning during the hearing, was that greater damage to diplomatic relations between the UK and France would be caused by a considered direction for disclosure by an official tribunal applying a public interest balancing test than by a Government Minister and the temporary civil servant acting as his special adviser committing a flagrant breach of their duties of confidentiality. While respecting Mr Sainty's seniority and specialist expertise we reject his opinion on this point. A foreign government may be equally unhappy about public disclosure, regardless of the manner in which it occurs, but we do not accept that a due process disclosure made in compliance with a freedom of information regime (of which, Mr Sainty confirmed, it would have knowledge) would cause as much damage to relations as an unauthorised and politically motivated leak by a Government Minister.
33. Our rejection of that part of the evidence is not decisive on the point, however, as we were satisfied by the evidence as a whole that damage would be caused to diplomatic relations in the circumstances of this case.
34. The test we have to apply is derived from the Court of Appeal's acceptance in *Dept for Work and Pensions v Information Commissioner and Zola* ([2016]EWCA Civ 758) of the test set out by the First-tier Tribunal's in *Hogan and Oxford City Council v Information Commissioner* ([2011] InfoLR 588). We are required, first, to consider the interest to be protected by the exemption under consideration. In this case that is the effective operation of diplomatic channels between the UK and France. The second consideration is the causal connection between the disclosure sought and the anticipated harm that may result. The risk must be "real, actual or of substance". Finally, the likelihood of the prejudice arising must be established as a real and significant risk in that it is more probable than not that it will arise.
35. It is important that governments should be able to have open and honest dialogue with one another and the dialogue would be less likely to occur (and/or would come to lack candour), if there was a doubt as to the maintenance of confidentiality. That applies as much to relatively informal exchanges as to formal dialogue in fully minuted and carefully structured discussions between governments. The damage would be less in this case than in many others because an unofficial version of the report of the relevant discussions had been put into the public domain and a leak inquiry report had both acknowledged the existence of the Memorandum and commented upon

the extent to which it contained an accurate report of the relevant exchanges. The exemption is nevertheless engaged, because there is a significant risk of residual damage being incurred as a direct result of the further disclosure which would occur if we were to find in the Appellant's favour.

36. A direction to disclose would have had the effect of demonstrating whether or not the Daily Telegraph report had been accurate and would have replaced a leaked document in the public domain with the definitively authoritative one. In a section 27(1) case an important issue is the perception of the foreign state involved. The fact that some or all of the information may already have been leaked (accurately or inaccurately) does not materially dilute the deleterious impact of the official release. It would still leave the UK Government with the significant challenge of containing the damage caused and rebuilding the French government's confidence. Although we are not bound by other decisions of the First-tier Tribunal we agree, on this issue, with the assessment made in *Campaign against the Arms Trade v Information Commissioner and Ministry of Defence* (EA/2007/0040), which was in these terms:

“prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary” (paragraph 81).

37. As to public interest, both the Scotland Office and the Information Commissioner acknowledge that a public interest exists in transparency, but beyond the general advantage of openness there is no advantage, specific to the circumstances of this case and the information concerned, beyond the Appellant's suggestion (see paragraph 12 above) that disclosure would bring closure and certainty to a confusing situation. The extent of the disclosure in the report of the outcome of the leak inquiry means that much relevant information has already been put into the public domain and we do not believe that balanced public debate would be better informed by the requested disclosure to which this exemption applies.
38. We regard the clarification that the Appellant seeks as a minor advantage, which is arguably outweighed, but certainly equalled, by the public interest in diplomats being able to speak freely to one another. The public interest in maintaining the exemption therefore outweighs the public interest in disclosure.

Section 40(2) – disclosure contrary to data protection principles

39. It is clear from a reading of the rest of the withheld information that those conducting the leak inquiry were justified in concluding that no one was responsible for the leak (either by carelessness or deliberate act) other than Mr Roddin and Mr Carmichael. Nor were the other individuals identified in the relevant materials responsible for any decision-making in relation to the issues discussed in the Memorandum. Each one was, as the Scotland Office asserted and is apparent from our own reading of the closed material, simply a conduit in a chain of communication through which the Memorandum reached those having a legitimate interest in its subject matter.
40. In those circumstances disclosure of the identity of relevant individuals would not serve any legitimate public interest. The Appellant argued, in general terms, that disclosure would provide clarity to a situation which was currently affected by murkiness and inaccuracy. We have had the benefit of reading the withheld materials and are satisfied that disclosure would not have that effect.
41. As to the impact of disclosure on the individuals affected, Mr Rycroft described the political climate, at the time when the Daily Telegraph published its article, as highly charged. He expressed the view that issues surrounding the SNP's relationship with other political parties continued to generate strong feelings after the General Election, particularly in light of the decision of the UK to leave the EU and the possibility of a future referendum on Scottish independence. He added that a small minority on both sides of the argument pursued their causes with vehemence and vitriol, leading to cyber abuse against those holding different views, as well as intimidatory protests. In this atmosphere the appearance of the Daily Telegraph report had generated vitriolic on-line abuse against those who it was suspected had generated the Memorandum as a way of undermining the SNP. Those attacked in this way included Francesca Osowska, the director of the Scotland Office at the time, and there was public speculation about the identity of those who might have been directly involved in the preparation of the Memorandum.
42. Mr Rycroft considered that all the senior civil servants identified in the withheld information would have justifiable fears that disclosure of their involvement would tarnish their reputation and put them at risk, even though they were shown in the leak report to have been entirely innocent. He drew support from subsequent events, in particular on-line allegations that individuals other than Mr Roddin and Mr Carmichael were implicated in the leak and/or had written the Memorandum with the express intention of damaging the SNP by circulating false information about Ms Sturgeon.
43. Although the Appellant suggested, when questioning Mr Rycroft and making his final submissions during the hearing, that the risks were over-stated, we

accept the evidence as support for the argument that those affected would have an expectation that they would not be identified. In our view it would be a reasonable expectation to have. There was, in our view, sufficient indications in articles on social media and in the official press, published at the time, to demonstrate that anyone identified would have been subjected to criticism or ridicule at a level that would render disclosure an unwarranted interference into their privacy.

44. Our conclusion in this respect would be the same whether we were assessing the situation as at the date when the Scotland Office ought to have responded to the information request (7 May 2015) or the later date (15 June 2015) when it actually provided a response. At the earlier date the individuals were still under investigation. By the later date they had been exonerated by the leak inquiry report. In light of our findings about the public mood at the time, we think that the individuals' reasonable expectations of privacy would have been the same on both dates.
45. We therefore conclude that any of the withheld information which named or otherwise identified an individual, regardless of their seniority, should be withheld as its release would constitute a breach of the data protection principles.

Section 27(2) – confidential information obtained from another State

46. Although this was not an exemption under consideration during the investigation which led to the Decision Notice, the Information Commissioner accepted the Scotland Office's case on it. The engagement of the exemption was not challenged by the Appellant.
47. At one level it could be said that the whole of the Memorandum represented information obtained from another State, even though the Daily Telegraph report suggested that in parts it recorded statements made by representatives of the Scottish Government rather than the French one. There was no serious challenge by the Appellant to the argument that the exemption was engaged and we infer that his argument on the public interest balance is the same as the one presented in respect of section 27(1). We have already set out our reasons for preferring the Respondents' arguments on that issue and we accordingly conclude that the exemption would have been engaged and that the public interest in maintaining the exemption would have outweighed the public interest in disclosure.

Section 31(1)(g), read with section 31(2)(c) – prejudice function of investigating improper conduct

48. The Appellant argued that section 31(1)(g) was not engaged because it was not one of the Scotland Office's functions to conduct investigations, whether for the purpose set out in section 31(2)(b) or otherwise. He was able to establish, through questioning, that leak enquiries were certainly a rare occurrence within the Scotland Office. However, as argued for by the Scotland Office, and ultimately accepted by the Information Commissioner, the exemption is not limited in its scope to the operations of the public authority to whom the original information request was directed. It is therefore the functions of the Cabinet Office that require to be considered. In that connection our attention was drawn to written evidence submitted by the Cabinet Office to the House of Commons Public Administration Select Committee in 2008 in relation to an investigation entitled "Leaks and Whistleblowing in Whitehall". It confirmed that the Cabinet Office, had responsibility for co-ordinating security matters across Government and that in some cases it may take the lead role in an investigation into a leak emanating from another Government Department. The relevant material was included in the Authorities Bundle, even though it was really evidence, but was consistent with what Mr Rycroft and Mr Aung told us about the relationship between Government Departments on the one hand and the Cabinet Office on the other.
49. We are therefore satisfied that the exemption is engaged by virtue of both limbs of the statutory test, namely the purpose of the investigation (for the purposes of section 31(2)(b)) and the function of pursuing such investigations (for the purpose of section 31(1)(g))
50. The Appellant argued that, given the uncertainty surrounding the Memorandum, it was in the public interest to end continuing speculation as to who was involved in the leak. The Scotland Office argued that disclosure would not provide any useful information on that topic and that any public interest in disclosure was outweighed by the public interest in protecting the investigatory techniques which the Cabinet Office deploys when investigating a leak.
51. We have read the withheld information and are satisfied that its disclosure would not provide useful information on the possibility of others having been involved in the leaking of the Memorandum. Although the processes adopted during the leak did not seem to us to be particularly revolutionary or unexpected, we are prepared to accept that disclosing them might provide some assistance to those wishing to carry out an undetected leak. In those circumstances we are satisfied that the public interest in protecting investigatory techniques, as well as ensuring that individual witnesses feel free

to talk openly, outweighs any public interest in disclosing the content of those of the communications that relate to the leak inquiry.

Section 38(1) – endangering individual’s health or safety

52. Both the Appellant and the Information Commissioner opposed the Scotland Office case on this issue. The Information Commissioner questioned, in particular, whether there was any evidence to support the argument that the health of any individual would be endangered by the disclosure sought. She did not accept that the evidence, such as it was, to the effect that staff members would be put under strain, or caused to worry, was sufficient. It did not, she argued, establish a causal link between disclosure and any recognised psychological disorder, let alone physical harm.
53. Mr Rycroft’s evidence included his thoughts on the potential impact on the mental, if not physical, health of those civil servants whose identities could be gleaned from the withheld information. He feared that they would have faced intimidation, abuse on social media and, potentially, threats of violence. However, his written evidence on the issue was unspecific and he was unable to expand on it when questioned by the Appellant. In our view, although the evidence established a sufficient level of risk of public criticism and exposure to justify the conclusion we have reached above in relation to unwarranted intrusion for the purposes of section 40(2), it did not go so far as to demonstrate that physical or mental health was or was likely to be endangered.
54. The exemption under section 38(1) was not therefore engaged.

Conclusions

55. The effect of the decisions we have recorded above is that:
- a. The Memorandum is exempt from disclosure in its entirety (under section 27(1) or, if we were found to be wrong on that, section 27(2));
 - b. Documents or parts of documents which repeat, comment on or embellish the report contained in the Memorandum are exempt under section 27(1) and those documents, or parts of documents, may be withheld;
 - c. Other documents, falling within the scope of the information request and recording events and decisions relating to the leak inquiry, constitute exempt information under section 31(1)(g), when read with section 31(2)(b), and may accordingly be withheld in their entirety;
 - d. To the extent that any of the documents, other than the Memorandum, contain information that identifies an individual person, the names or

other identifying information may be redacted before disclosure, to the extent that the document as a whole falls to be disclosed. Disclosure may arise because:

- i. our decision under a. b. or c. above is found to have been in error; or
- ii. the Decision Notice (paragraph 46) ordered disclosure; or
- iii. the Scotland Office and the Information Commissioner have subsequently agreed that it may be disclosed.

More detail about the impact of our decision on particular elements of the withheld information appear in the confidential annex to this decision.

56. The detailed application of our decisions to the withheld information is explained in more detail in the confidential annex to our decision. It is to remain confidential unless and until a higher tribunal or court, hearing an appeal from this decision, should order otherwise.

57. Our decision is unanimous.

Signed

Judge of the First-tier Tribunal

Date: 13 January 2017

Promulgation Date: 13 January 2017