



Neutral Citation Number

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2017/0111 & 0113**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

**The Information Commissioner's Decision Notices Nos: FS550648604 &
FS50645339**

Dated: 24 May 2017 and 30 May 2017

Appellant: Dr Benjamin Dean

Respondent: Information Commissioner

Public Authority: NHS England

Heard at: Judge's Chambers London

Date of hearing: 16 October 2018

Date of decision: 22 October 2018

Before

Angus Hamilton DJ(MC)
Tribunal Judge

and

Andrew Whetnall

and

Mike Jones

Subject matter: s 36 (Prejudice to the effective conduct of public affairs) and s.43 (commercial interests) Freedom of Information Act 2000

Cases considered:

Guardian Newspapers and Brooke v IC and the BBC [2011] 1 Info LR 854

Department for Environment Food and Rural Affairs v The Information Commissioner & The Badger Trust [2014] UKUT 526 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal for the reasons given below. NHS England is required to respond anew to Dr Dean's enquiry, taking into account the Tribunal's decision, within 28 days of the publication of this decision. This judgment stands as the substituted Decision Notice.

REASONS FOR DECISION

Introduction

1. Under section 1(1) of FOIA (the Act) a person who has made a request to a public authority for information is, subject to other provisions of FOIA:

- (1) entitled to be informed in writing by the public authority whether it holds information of the description specified in the request (section 1(1)(a)); and
- (2) if the public authority does hold the information, to have that information communicated to him (section 1(1)(b)).

2. S.36(2) of FOIA provides:

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—

a)

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, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

3. S.43(2) of FOIA provides:

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

4. The exemptions under s.36 and s.43 are 'qualified exemption' and if any of the exemptions are engaged then consideration must be given to the 'public interest balancing test' (PIBT), namely, whether, *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*: S2(2)(b) FOIA.

Background

5. There appeared to be no dispute between the parties that the Commissioner had set out the chronology of these matters correctly and the Tribunal therefore adopted that description:
6. On 26 February 2016 Dr Dean requested information of the following description (the 0111 request):

"As regards Deloitte's work on the costing of 7-day services which was reported in Jan 2015 in the Health Service Journal.

1. May I see the NHS England meeting minutes relating to this decision from early 2015 and 2014.

2. May I see correspondence with Deloitte before this work was carried out relating to this potential work.

3. May I see the internal correspondence from NHSE relating to this decision.

4. When will this work be published and is it possible to see this work now?"

Note 'this decision' relates to decision by NHSE to get Deloitte to carry out this work on 7-day services".

7. NHS England provided the information sought under part 1 of the request and stated that information was not held for parts 2 and 3 but refused to provide the information requested at part 4 of the request. The information in question was versions of a slide pack prepared by Deloitte for NHS England to facilitate discussion and consideration of the impact and challenges associated with seven-day service reforms to the NHS. NHS England relied upon the exemptions in ss. 36(2)(b)(ii), or 36(2)(c) and/or s.43(2) FOIA to withhold the slides. NHS England abandoned reliance on s.43(2) during the Commissioner's investigation.

8. On 1 April 2016, Dr Dean made a further request (the 0113 request) arising out of the documentation disclosed in response to the 0111 request:

"would it be possible to request to see the Deloitte slides from the November meeting?

Also, would it be possible to get hold of the Deloitte presentation from Feb 2015?

Also, is there any way you can find out who actually attended the Feb 2015 meeting?"

9. NHS England responded stating that it held information within the scope of the first and second parts of the request but did not hold any recorded information to show who attended the February 2015 meeting. NHS England relied upon the exemptions in ss. 36(2)(b)(ii), or 36(2)(c) and/or s.43(2) FOIA to withhold the slides and presentation.

Dr Dean sought an internal review which resulted in NHS England upholding its original position. Dr Dean then complained to the Commissioner.

10. Following the investigation, the Commissioner issued two separate DNs. In each DN the Commissioner upheld NHS England's reliance on s. 36(2)(b)(ii). The Commissioner concluded that in each case the qualified person's opinion had been given and was reasonable and that the PIBT favoured the maintenance of the exemption. The DNs did not make any decision regarding the claimed s.36(2)(c) exemption.
11. Dr Dean then submitted appeals to the Tribunal. Although this matter involves two separate appeals against Decision Notices (DNs) issued by the Commissioner (IC), the Appellant in both matters is Dr Dean and the public authority (PA) is NHS England (a PA previously known by other titles). The two appeals have been joined together because they both give rise to similar issues and refer to (almost) the same exemptions in FOIA.

Issues Relating to these Appeals

- 12 The Tribunal noted that Dr Dean's appeal in the 0111 matter is dated 26 May 2017 and the appeal in the 0113 matter is dated 31 May 2017. The Tribunal has not been given any explanation by any party or the administrative unit which supports the Tribunal as to why consideration of these matters by the Tribunal has been delayed for so long. The Tribunal cannot therefore offer any explanation to Dr Dean but would understand if he felt a sense of grievance over this unexplained delay. Such appeals are usually considered far more promptly than this.
- 13 The Tribunal noted that another appeal originating from a Dr Sturgeon and relating to material similar or identical to that sought by Dr Dean

had also been joined to Dr Dean's appeals. Dr Sturgeon had then withdrawn his appeal but the submissions of the parties on Dr Sturgeon's appeal remained in the papers submitted to Tribunal. In the Tribunal's view it would have been preferable for the Commissioner and the PA to be directed to resubmit submissions dealing only with Dr Dean's appeal rather than leaving it to the Tribunal to carry out this editing exercise.

14. The Tribunal also noted that the Commissioner's submissions contained a request that this Tribunal consider the evidence of a Mr Wilson which was presented to the Tribunal considering another appeal from Dr Dean. Yet no attempt seems to have been made by the Commissioner to include that evidence in the bundle for this case.
15. The Tribunal further noted that in request for the Qualified Person's (QP's) opinion dated 25 April 2016 the FOIA request is quoted as:

'Please can you provide me with a copy of any emails between Sir Bruce Keogh and anyone at Deloitte between 1 January 2015 and 1 September 2015'

As can be seen from the quotation of Dr Dean's enquiry above this was not a request that he made. The QP's opinion does clearly consider the material that forms the contents of the withheld information in this case, but it was rather bewildering to the Tribunal that Dr Dean's request should be mis-stated in this manner.

16. The Tribunal also noted that a single bundle of 'closed material' (the withheld information) had been submitted to the Tribunal. It was not at all clear within that bundle which material was the subject of the 0111 matter and which the 0113 or indeed if there was material within the closed material which was not actually the withheld information in either case. This was a pertinent point bearing in mind the withdrawal of Dr Sturgeon's appeal and the subsequent failure to edit submissions.

17. Further, the Tribunal noted that it was rather unclear whether the PA still sought to rely on the s43(2) exemption in relation to the 0113 matter. In relation to the 0111 matter the Commissioner's DN states clearly (para 8) that the PA indicated during the course of the Commissioner's investigation that it did not rely on the s.43(2) exemption. There is no similar indication at all in the DN for 0113 and indeed that DN indicates that the Commissioner actively considered the s.43(2) exemption (para 7). However, in the Commissioner's Response to the Appeal the Commissioner unequivocally states that the PA withdrew reliance on s43(2) in relation to both of Dr Dean's appeals and indeed also in relation to Dr Sturgeon's appeal (see footnotes at p2 and p3 of the Response). The Tribunal also noted that NHS England in its own submissions made no reference at all to s.43(2).
18. The relevance of this is that following the Upper Tribunal decision in what is now commonly referred to as the *Malnick* case it is incumbent on the Tribunal to consider and adjudicate on exemptions relied on by a PA but upon which the Commissioner has not reached a decision. Based on the assertions by the Commissioner in her Response which were not contradicted by the PA the Tribunal concluded that s.43(2) was not an exemption which they would have to consider. Conversely, in the Tribunal's opinion it is also not an exemption which the PA could now seek to rely on as they have effectively abandoned it.
19. Following on from this point the Tribunal did conclude that, if appropriate, it would have to consider the exemption under s.36(2)(c) as this was relied on by the PA, not abandoned but also not adjudicated on by the Commissioner.
20. The final preliminary point of concern for the Tribunal was the failure of the PA and the Commissioner to present submissions on the relevance, interpretation and impact of s.36(4) FOIA which provides:

In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.

- 21 In the view of the Tribunal the withheld information consisted largely of statistical information and yet the impact of s.36(4) was not addressed by the PA or Commissioner. It is understandable that Dr Dean did not address the issue as he had no detailed knowledge of the contents of the withheld information.
22. Because of all these preliminary concerns the Tribunal did debate adjourning the consideration of the appeals and seeking further submissions. However, given the age of the appeals, the additional costs involved in an adjournment, the ample time that the parties had had to consider the matters fully and submit representations and the ability of the PA and Commissioner to call easily on professional legal opinion, the Tribunal decided it would be better to complete its considerations on the available papers. The parties must however accept that some consequences may flow from the failure to address properly the issues outlined above.

The Questions for the Tribunal

- 23 This matter was considered on the papers only. NHS England was joined as a party to the proceedings and made its own written representations to the Tribunal. These very much supported the Commissioner's analysis.
- 24 The Tribunal considered from the Commissioner the DNs and Response to the Appeal; from Appellant the Grounds of Appeal and Reply and from the PA its Response to the Appeal. The Tribunal also carefully considered the contents and nature of the withheld information.
- 25 The Tribunal decided that there were two questions to be considered:

- First whether the exemptions relied on in s. 36(2) FOIA were engaged or, in other words, whether the opinion of the qualified person on the issue of engagement was 'reasonable'. The Tribunal noted that Dr Dean submitted that the opinion was not reasonable, and the PA and Commissioner submitted it was.
- Secondly, whether the PIBT favoured maintaining the exemption or favoured disclosure.

26 The Tribunal took the practical decision to look at the PIBT first. In doing so the Tribunal accepted that they were, at least initially, embracing the contention that the qualified person's opinion was reasonable. The Tribunal also acknowledged that in doing so the Tribunal were bound to:

'give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest' [Guardian Newspapers and Brooke v IC and the BBC [2011] 1 Info LR 854 at para 92].

27 In relation to the PIBT the Commissioner submitted:

a. The Commissioner accepts that there is an important transparency interest in the context of negotiations and discussions over a matter arousing significant political controversy, namely these changes to NHS services.

b. However, that controversy also in some respects underlines the importance of providing a 'safe space' to enable the free and frank exchange of views for the purposes of deliberation and the effective conduct of public affairs. It is material to consider the scale of public interest and controversy relating to these issues in relation to the severity and breadth of inhibition is [sic].

Controversiality [sic] cuts both ways: while transparency is particularly important where matters are controversial, it is also particularly necessary for public authorities to have a 'safe space' to develop policy, without that policy formulation and development being accessible to all the world under FOIA.

- c. *The withheld material contains information relating to the formation and development of government policy, requested at a time when the development and implementation of those policies was both 'live' and a matter of significant controversy.*

- d. *The withheld material was intended to be discussed privately, to assist in the development of that policy. NHS England had commissioned expert analysis from Deloitte, and that expert analysis was being used by NHS England and other key entities involved in policymaking to develop proposals with further assistance from Deloitte. That is precisely the kind of process in relation to which a safe space is necessary to ensure that the free and frank exchange of views for the purposes of deliberation is possible, without those views being shared with all the world under FOIA.*

- 28 The PA relied in its submissions on the representations of both the Commissioner and the QP. The QP commented in his opinion:

Disclosure of this Information would be likely to inhibit the "free and frank exchange of views for the purposes of deliberation". The slides were intended to generate discussions and facilitate consideration of issues relating to 7-day services, prior to the formal policy development process. It is a necessary part of policy formation to enable such discussion in the early stages of

the process. The discussions took place between a small group of Individuals, and on the basis that the discussions would be private, and individuals could openly express their views.

Premature disclosure of this information would have a "chilling effect" on these free and frank discussions, with the effect being that individuals may start to moderate their comments. There is a recognized public interest in enabling a "safe space" within which controversial or sensitive Ideas can be explored.

The "chilling effect" is likely to apply to both this project, and future projects. Work is still underway to develop the formal policy that will underpin 7-day services, and this development may be hindered if free and frank discussion does not continue.

In addition, disclosure of this information could also impact future projects and discussions about controversial and sensitive policy issues, in that staff would have reason to believe that all discussion could be released to the public.

This "chilling effect" would in turn impair the quality of policy making by NHS England. The resulting situation would be one where such decisions were made without NHS England having all the relevant information; and without full and frank deliberations over options having taken place.

There is a clear public interest in promoting a "safe space" within which free and frank discussion of options and potential impacts can be explored, especially when analysis is at an early stage.

Premature disclosure of the Information would generate considerable media coverage, which would distract from the process of developing and agreeing the formal policy on 7-day services. The most helpful way for the information to be made

available to the public is via the formal communications plan and premature disclosure would not be helpful to the public, in that the detail in the slides requires context, in order that the key issues are made clear. [QP's emphasis].

- 29 The QP made further comments in support of the contention that the PIBT favoured maintain the exemption but the Tribunal considered these to be rather repetitious and lacking in novel points. It should also be mentioned that, as they should, both the Commissioner and the QP considered the arguments in favour of disclosure. Those unsurprisingly echoed Dr Dean's own contentions that the PIBT favoured disclosure.
- 30 Taken together these can be summarised (with some repetition) as follows:
- a. *The matters discussed between Deloitte and NHS England includes the clinical case for 7-day services, the cost/benefits and the nature of 7-day reforms; these are all key matters of public interest. It is precisely this kind of information that should be within the public domain so that the public can be fully informed and involved in any future health service reforms.*
 - b. *Disclosure of this information would catalyse the more effective conduct of public affairs by enabling the public to be better informed about the likely realities and potential implications of the government 's 7-day reforms. Any information relating to the potential benefits or cost effectiveness of such health policy should be within the public domain.*
 - c. *There is a lack of clarity over the origin of the information that was used to inform decisions on the need for the reforms (and in particular mortality figures) and disclosing any information which would shed light on this would be in the public interest.*

- d. *The public interest argument in favour of releasing this information is compelling given the political context of the government's 7-day reforms and widespread concerns raised.*
- e. *Making this information available could help correct misleading or incorrect information currently in the public domain.*
- f. *There is a public interest in allowing free and frank discussion of options, especially at the initial stages of policy development. This allows for debate and testing of all options, and in turn, allows NHSE (or indeed any policy maker) to perform its functions to a higher standard, and significantly decreases the likelihood of policy being implemented that is unsuccessful or unworkable.*
- g. *There is a strong public interest in the information relating to seven-day services and the underlying analysis due to the national media interest in this matter and in the interests of it operating openly and transparently.*

31 The Tribunal gave consideration to the approach of the Upper Tribunal in the case of *Department for Environment Food and Rural Affairs v The Information Commissioner & The Badger Trust* [2014] UKUT 0526 (AAC). This was a case under the Environmental Information Regulations rather than FOIA but the contentions of the parties and the issues considered in relation to the PIBT (including the 'safe space' and 'chilling effect' arguments) are very similar to the present case.

32 In the *DEFRA* case the UT's conclusion (which actually appears at the start of the judgment) was:

In our view an examination of the contents of the disputed information leads inexorably to the conclusion that [the items] ... that constitute the disputed information do not match their billing in the DEFRA evidence to the effect that they are documents that reflect and disclose the content of robust, candid, and

innovative discussion and thinking. Nor would their disclosure now or as at about September 2012 give rise to a significant risk of damage to the public interest either directly or indirectly by affecting equivalent discussions and risk assessments in similar situations. [para 8]

33. The Tribunal carefully considered the withheld information in the present case and came to very much the same conclusion. The Tribunal is restrained from describing the contents of the withheld information in detail but The Tribunal considered that it wholly or almost wholly lacked any element of *robust, candid, and innovative discussion and thinking*. Indeed, the material in the Tribunal's view appeared to lack any elements of discussion or debate at all. The Tribunal noted the QP's assertion that -

'The slides were Intended to generate discussions and facilitate consideration of issues relating to 7-day services'

- whilst also noting that the slides (the withheld information) themselves contained no such discussion or consideration.

34. Furthermore, apart from the material originating from a large consultancy, known to all the parties, there was no identification of any person or body contributing to any discussion. In the absence of such identification the Tribunal struggled to see how the 'chilling effect' argument could be sustained since there were no persons identified who might experience such 'chilling'. The slides are indicative of debates and discussions having taken place, as their contents are altered over time, but they do not record those discussions or identify any individual participating or contributing.
35. The Tribunal thought that it was noticeable that neither the Commissioner nor the QP sought to apply general principles such as 'safe space' and 'chilling effect' directly to the withheld information.

Rather they both sought to make generalised assertions. Direct references to the withheld information could have been made, if necessary, through closed submissions.

36. The Tribunal also noted that the QP repeatedly expressed concern about the 'premature disclosure' of the withheld information. This phrase carries the implication of there being a time when, in the view of the PA, disclosure would be unproblematic. Given the time that has passed between Dr Dean's request and the consideration of the appeal this is a potentially relevant issue. The Tribunal noted the discussion entitled 'At what Date should the Public Interest Balancing Exercise be Conducted?' in the *DEFRA* case (para 44) and the lack of clarity around the issue. Consequently, this was not a determinative point in the Tribunal's decision-making but is mentioned as an issue which may have an impact on the PA's response to this decision.
37. For the reasons given at paragraphs 33-35 above the Tribunal considered that the PIBT arguments in favour of maintaining disclosure were quite weak. Conversely the Tribunal considered that the PIBT arguments in favour of disclosure had both strength and merit. The Tribunal's conclusion is that the PIBT favours disclosure.
38. The Tribunal considered the exemption under s.36(2)(c) which the PA relied on but upon which the Commissioner reached no conclusion in her DNs. The Tribunal concluded that the PIBT considerations for the s.36(2)(c) exemption would be identical or near identical to those for the s.36(2)(b)(ii) exemption and the Tribunal's conclusion on the PIBT would consequently be the same.
39. The Tribunal took the view that by focussing on the PIBT it was not necessary to adjudicate on the applicability and effect of s.36(4) FOIA (see paragraph 20 above). The Tribunal's preliminary approach was to assume that this was a case where a QP should give an opinion and that that opinion had to be given weight. If in fact s.36(4) did apply to

the withheld information on the basis that it was largely or wholly statistical then this would have no impact on the Tribunal's ultimate decision as the impact of s.36(4) appeared to the Tribunal to be that less, or even possibly no, weight would be given to a QP's opinion – although presumably a statement from such a person could still be submitted by a PA as 'ordinary' evidence to be considered by a Tribunal in a case to which s.36(4) applied.

40. The Tribunal's unanimous decision is therefore that the appeal should be allowed.

Signed: Angus Hamilton DJ(MC)

Tribunal Judge

Date: 22 October 2018

Promulgated: 24 October 2018