



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

Appeal Reference: EA/2020/0081P

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Susan Wolf
Marion Saunders

**Determined, by consent, on written evidence and submissions
Considered on the papers on 2 June 2021.**

Between

Tommy Sheppard MP

Appellant

-and-

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is allowed, and a substituted decision notice made in the form of this decision.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 98 and a closed bundle.

BACKGROUND

4. On 3 June 2019, the Appellant requested information of the following description from the Cabinet Office: -

“Please send me:

« All information relating to polling the general public on their perception on the strength of the union since January 2018. This includes any spending on such polling in each month by your Department.

» All information relating to contact from your Department with Ipsos Mori in the last 6 months for polling on the general public's perception of the state of the union.

I would like the above information to be provided to me electronically at [email address].

If this understanding is too wide or unclear, I would be grateful if you contact me as I understand that under the Act, you are required to advise and assist requesters. If any of this information is already in the public domain, please can you direct me to it, with page references and URLs if necessary.”

5. On 1 July 2019, the Cabinet Office responded. It refused to provide the requested information. It cited section 35(1)(a) FOIA (formulation and development of government policy) as its basis for doing so. The Appellant requested an internal review on 5 July 2019. The Cabinet Office sent him the outcome of its internal review on 14 August 2019 in which it upheld its decision.
6. The Appellant contacted the Commissioner on 20 August 2019 to complain about the way his request for information had been handled and disagreed that section 35 FOIA was applicable.

THE LAW AND GUIDANCE

7. Section 35(1)(a) FOIA states that: -

“(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to- (a) The formulation or development of government policy...

8. If the exemption applies it is subject to a public interest test which can nevertheless lead to the disclosure of the information if the public interest in disclosure outweighs the public interest in withholding the information.

9. The Commissioner has produced guidance on the application of s35(1)(a) FOIA which includes the following: -

9. Section 35 is class-based, meaning departments do not need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described. The classes are interpreted broadly and will catch a wide range of information.

11. Generally speaking, there is no inherent or automatic public interest in withholding information just because it falls within a class-based exemption. Departments will need to consider the content and sensitivity of the particular information and the effect its release would have in all the circumstances of the case before they can justify withholding the information.

23. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private.

26.... In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives.

33. To be exempt, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

34. However, the exemption will not cover information relating purely to the application or implementation of established policy. It will therefore be important to identify where policy formulation or development ends and implementation begins.

42. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy: • the final decision will be made either by the Cabinet or the relevant minister; • the government intends to achieve a particular outcome or change in the real world; and • the consequences of the decision will be wide-ranging.

56. ... the policy can be seen as a framework of 'rules' put in place to achieve a particular objective. This framework will set some fundamental details in stone but will also inevitably leave more detailed decisions for those implementing the plan, thus giving some inbuilt flexibility on how it can be delivered. Any such adjustment or decision that can be made within this inbuilt flexibility – i.e. without altering the original objectives or rules – is likely to be an implementation decision rather than policy development.

79. The key public interest argument for this exemption will usually relate to preserving a 'safe space' to debate live policy issues away from external interference and distraction. There may also be related arguments about preventing a 'chilling effect' on free and frank debate in future and preserving the convention of collective responsibility.

THE DECISION NOTICE

10. The decision notice in this case is dated 27 January 2019 (reference FS50867455). The Commissioner sets out her view that: -

11.... the 'formulation' of policy comprises the early stages of the policy process - where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

11. The Commissioner set out the Cabinet Office's explanation for withholding the information: -

14. The Cabinet Office explained that the policy in question related to monitoring public opinion with respect to the Union of the United Kingdom and the

government's "policy commitment to maintain the integrity of that Union between all four nations: England, Scotland, Wales and Northern Ireland".

15. It explained a timeline of polling and research it had commissioned on this broad subject including some which postdates the request and therefore falls outside the scope of the Commissioner's investigation. It argued that final data which fell within the scope of the request had only just been presented to it and therefore it had not yet had the opportunity to give it due consideration. It argued that the information, therefore, formed part of a policy consideration that was in its early stages of formulation.

12. The Commissioner's decision that the exemption in s35(1)(a) FOIA applies is set out in these two paragraphs: -

17. In its letter of internal review, the Cabinet Office explained that whilst the UK Government does have an overarching policy to maintain the integrity of the Union, this is underpinned by ongoing activity to support the development of that policy.

18. Having reviewed the information and having considered the arguments of both parties, the Commissioner is satisfied that the information in question relates to the early stages of reviewing or improving existing policy. The Cabinet Office's arguments to the Commissioner were not wholly clear on this point in correspondence with her. However, in its letter to the complainant setting out the outcome of its internal review and other comments in its letter to the Commissioner, the Cabinet Office appeared to argue that the information related to the development of policy rather than, strictly speaking, to its formulation. The Commissioner accepts that policy work is not necessarily conducted according to a prescribed formula, particularly where additional research is required in response to events. She considers this point particularly relevant here.

13. In relation to the public interest test the Commissioner recognises the public interest in transparency in relation to the use of public funds, and in 'seeing what information the Cabinet Office is using to assess public attitudes to the Union' and the strength of the Union. However, the Commissioner noted that the information: -

31. ...represents work which is clearly in its early stages and had not, at the time of the request, been fully analysed or considered. There are therefore also compelling arguments to protect the safe space in which such work is undertaken. The Commissioner accepts that the government needs a safe space in this case to develop ideas, debate live issues and reach decisions away from external interference and distraction. At the time of the request, this was clearly a "live" matter. In such circumstances, the Commissioner thinks that greater weight can be added to the public interest argument in favour of protecting that safe space in which policy matters are discussed.

32. In the circumstances of this case, the Commissioner concludes that the public interest favours maintaining the exemption. Moving forward, where circumstances change, the balance of public interest may also change. In reaching this view, the Commissioner has given particular weight to the timing of the request. The Commissioner is satisfied that the information was informing live policy development at the time of the request and that there is a stronger public interest, in the circumstances of this case, of protecting the space in which that policy is being developed.

THE APPEAL

14. The Appellant's appeal is dated 25 February 2020. In a covering letter he states: -

The Government is clearly not seeking to change policy as it relates to the union between Scotland and the rest of the UK. Indeed, it has been explicit in saying that it has no plans to change the basis of the union, for example, by agreeing a public vote on Scottish independence or introducing further devolution legislation. It seems clear to me that the government's intention is to defend and promote the existing policy rather than to review it. That is not policy development and therefore, I believe, should not be used as an excuse not to provide information under the terms of section 35.

15. The Appellant argues there should be: -

.... some evidence provided by the government that it is genuinely reviewing policy with a view to considering change. Mere assertion from the government department in question should not be sufficient to invoke this exemption.

16. On the question of public interest, the Appellant says: -

The Commissioner notes in her report (paragraph 26) that "there is a clear public interest in seeing what information the Cabinet Office is using to assess public attitudes to the Union... The Commissioner recognises that there is a public interest in understanding more about any analysis the Cabinet Office is undertaking regarding the strength of the Union." She then goes on to say (paragraph 29) that "The Commissioner also acknowledges a public interest in transparency regarding the use of public funds... the Commissioner thinks that there is a clear public interest in knowing more about what that money paid for."

Given this, I find it difficult to understand why the Commissioner has concluded that the public interest does not override the exemption provided for in 35(1) (a). Indeed, I would argue the opposite.

17. The Commissioner's response does not raise any matters not set out in the decision notice.

18. The Cabinet Office has not made any submissions in this case but its letter sent to the Commissioner on 9 October 2019 explaining its reliance on s35(1)(a) FOIA (as referred to in the decision notice) is now available, and sets out in some detail its view of the position.

19. As the Cabinet Office explained to the Commissioner: -

The entirety of the information relates to the broad area of attitudes towards the Union of the United Kingdom and the Government's policy commitment to maintain the integrity of that Union between all four nations: England, Scotland, Wales and Northern Ireland.

.... the Cabinet Office has been conducting periodic research to establish a clear understanding of public attitudes toward social, cultural and economic bonds between the UK nations and how these factors drive broader perception of the value of being part of the United Kingdom. Titled the "UK Perspectives Project", the initial research by Ipsos MORI was conducted in March 2018. The full report and data tables from this research were delivered in June 2018.

The Cabinet Office has also commissioned research on Attitudes to Devolution and the Union (conducted by Britain Thinks). The full report and data tables (separately for Wales, Scotland and England) for this piece of work were delivered in May 2018.

The UK Perspectives Project was extended in November 2018 to include a further round of research, which Ipsos MORI successfully bid for. This commenced in April 2019 and concluded in May 2019. Headline findings were delivered to the Cabinet Office on 24 May and final data tables from telephone surveys were delivered on 31 May 2019.

20. The Cabinet Office also explained that: -

As such, at the time of Mr Sheppard's request, the final data had been in the Cabinet Office's possession for a total of three days (clearly not sufficient time for the data

to have been absorbed, analysed and its implications given due consideration, let alone for it to have led to an agreed policy direction that could have received Ministerial approval and sign-off). Given this, the Cabinet Office considers that it was entirely correct, at the time of the request, in maintaining that this information still formed a policy consideration in the very early stages of formulation and falling entirely and squarely within the auspice of material protected by section 35(1)(a) of the Act.

The Cabinet Office was, therefore, at the time of the request, still in the process of taking forward its work (which is still ongoing) to develop the UK Government's approach and policy for the Union Strategy based upon the commissioned research.

The Cabinet Office is, therefore, of the opinion that it was entirely correct to withhold this information under section 35(1)(a) as it very clearly falls within the remit of information pertinent to the formulation or development of government policy and that it was also correct in its assessment of the public interest test that release of this information at such an early stage of policy development would be prejudicial to the ability of officials and Ministers to explore and discuss all available options in a free and frank manner, and to understand their possible implications, and would adversely affect the quality of the debate underlining effective decision-making. To have released this information at the time of the request (or, indeed, currently) would have been extremely premature and not in the public interest.

21. We note that there are some short-redacted passages in this letter which amplify some of the points made by the Cabinet Office. The Tribunal has carefully considered these but in our view, they do not impact on the conclusions we set out below.

DISCUSSION

22. The issue that the Tribunal has to grapple with in this case is whether the requested information relates to policy formulation or development by the government. If it does not, then the exemption in s35(1)(a) FOIA does not apply and no other basis has been put forward by the Cabinet Office for withholding the information.
23. It is noteworthy that the Commissioner herself seemed uncertain what the Cabinet Office case was in relation to s35(1)(a) FOIA. The Commissioner said that the Cabinet Office's arguments in correspondence to the Commissioner were 'not wholly clear' on the issue as to whether the information in question relates to 'the early stages of reviewing or improving existing policy' (see paragraph 18 of the decision notice, set out

in full above). The Commissioner noted that, in its internal review, the Cabinet Office ‘appeared to argue that the information related to the development of policy rather than, strictly speaking, to its formulation’. This seems to be a reference to the letter of 14 August 2019 where the Cabinet Office stated that: -

Whilst the UK Government does have an overarching policy to maintain the integrity of the Union, this is underpinned by ongoing activity to support the development of that policy.

24. The Tribunal has difficulties with this wording, which appears to be an attempt to present polling about the implementation of the established policy (maintaining the integrity of the Union), as activity relating to development of the policy, without explaining in what way the main policy might be developed or altered as a result.

25. The Commissioner states (also paragraph 18) that she considers as particularly relevant ‘that policy work is not necessarily conducted according to a prescribed formula, particularly where additional research is required in response to events. However, this is a general statement of the Commissioner’s approach and does not explain at all how it is relevant to whether the requested information in this case relates to policy development, even though this appears to be her main reason for so finding.

26. We note an important paragraph from the Commissioner’s own guidance which she has not cited in the decision notice (but which we have set out above), which relates to the difference between ‘implementation’ of policy and ‘development’ of policy. This states that: -

56. ... the policy can be seen as a framework of ‘rules’ put in place to achieve a particular objective. This framework will set some fundamental details in stone but will also inevitably leave more detailed decisions for those implementing the plan, thus giving some inbuilt flexibility on how it can be delivered. Any such adjustment or decision that can be made within this inbuilt flexibility – i.e. without altering the original objectives or rules – is likely to be an implementation decision rather than policy development.

27. This is guidance that is highly pertinent to the requested information in this case, and it seems surprising that the Commissioner has not referred to it. Thus, in this case there is a policy of retaining the union, and the polling investigates public perceptions towards it

with a view as to how the policy should be implemented. The polling informs and evaluates the policy and the effectiveness of its communication, in a way which, when we apply the guidance in paragraph 56 of the Commissioner's guidance, leads us to the conclusion that the information relates to the implementation of existing policy rather than to policy development.

28. Having reached that conclusion our view is that the exemption in s35(1)(a) FOIA does not apply to the requested information in this case. As such we do not need to go on to consider the public interest test in this case.
29. However, if we had decided that the information related to the development or formulation of policy, we would comment that it is hard to see how the disclosure of this polling information would in any event inhibit upon any 'safe space' that would be required to consider formulation and development of policy. Thus, the results of the polling from the studies described in the Cabinet Office's letter of 9 October 2019 would be available if the information were disclosed, but nothing would have been made available (because not requested) about any policy development discussed as a consequence of those results.
30. The Cabinet Office argues that it had only had the information for three days when the Appellant made his request which did not give the Cabinet Office enough time to absorb or analyse it. However, the Appellant did not ask for any analysis of the information (which no doubt has taken place since the request was made). He has asked for details of the polling that has been carried out and the related financial information. The nature of the information was the same at the date of the request and at the date that the Cabinet Office last dealt with the matter, ten weeks later, on 14 August 2019 which was the date of the internal review (and the date when matters of public interest were last considered by the Cabinet Office). It seems to us that the fact that the request was made three days after the Cabinet Office received the information is not a matter which impacts on our deliberations.
31. Against any public interest in favour of non-disclosure, we have already set out the Appellant's summary of the public interest factors identified by the Commissioner's decision notice in favour of disclosure. There is, according to the Commissioner: -

- (a) a clear public interest in seeing what information the Cabinet Office is using to assess public attitudes to the Union;
- (b) a public interest in understanding more about any analysis the Cabinet Office is undertaking regarding the strength of the Union;
- (c) a public interest in transparency regarding the use of public funds;
- (d) a clear public interest in knowing more about what that money paid for.

32. In circumstances where, in our view, the ‘safe space’ argument would not provide a strong public interest against disclosure, it seems to us that these factors, identified by the Commissioner, would have provided a very strong argument in favour of disclosure if we had found that the exemption was applicable.

33. In those circumstances we allow this appeal. Subject to what follows, disclosure of information within scope of the request and in existence at the time the request was made on 3 June 2019 must be disclosed by the Cabinet Office to the Appellant within 28 days.

34. The Cabinet Office provided the Commissioner with a large bundle of information which we now have in a CLOSED bundle which was said to be within scope. The Commissioner noted that some of this post-dated the request and that need not be disclosed to the Appellant. There is also personal information in the material in our CLOSED bundle, mostly in the form of names, addresses and telephone numbers, and some other identifying information, which should not be disclosed, pursuant to s40 FOIA, and that should be redacted prior to disclosure to the Appellant.

35. A copy of this decision must be sent to the Cabinet Office forthwith.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 10 June 2021

Date Promulgated: 14 June 2021