



Neutral citation number: [2023] UKFTT 00908 (GRC)

Case Reference: EA/2023/0088

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

**Decided without a hearing On: 24 October 2023
Decision given on: 31 October 2023**

Before

**TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER ANNE CHAFER
TRIBUNAL MEMBER NAOMI MATTHEWS**

Between

ALEXANDER FANTA

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Dismissed

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 30 January 2023 (IC-188520-M2H8, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns a request for minutes and emails of meetings with an external organisation, Thorn, from the Home Office.
2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).
3. On 22 February 2022, the Appellant wrote to the Home Office and requested the following information (the “Request”):

“I would kindly ask for a list of all meetings by officials and all minutes and e-mails relating to such meetings with representatives of the organisation Thorn on issues of child safety and/or encryption.”

He subsequently clarified that the timescale was from 1 July 2019 to the present.

4. Thorn is a US-based organisation that works with governments and private companies to combat online child sexual exploitation and abuse.

5. The Home Office responded on 4 May 2022 and confirmed that they held information related to the request, but it was exempt from disclosure. The Home Office relied on section 27(1)(b) and (c) (prejudice to international relations or the interests of the UK abroad), and section 35(1)(a) (formulation or development of government policy).

6. The Appellant requested an internal review on 9 May 2022. The Home Office responded on 24 August 2022 and relied on the same exemptions.

7. The Appellant complained to the Commissioner on 25 August 2022. During the Commissioner’s investigation, the Home Office said that sections 27(1)(b) and (c) were cited in error, and the response should have read sections 27(1)(a) and (b). The Commissioner decided that the exemption at section 27(1)(a) and (b) applied to the information:

- a. Section 27 was engaged as prejudice “would be likely to occur” from disclosure to the UK’s relations with other states (the G7 and Five Country Working Group Partner Nations) and international organisations (the WeProtect Global Alliance), as it would undermine the space for gathering and sharing views with these stakeholders on a “live” sensitive issue.
- b. Although there are public interests in favour of disclosure the public interests in favour of maintaining the exemption outweighed those in favour of disclosure, including in particular that the UK conforms to the conventions of international behaviour and collaboration, including maintaining confidentiality.

The Appeal and Responses

8. The Appellant appealed on 21 February 2023. His grounds of appeal are:

- a. Section 27(1) exemptions do not apply to documents dealing with a private organisation, registered as a non-profit under US law.
- b. The Home Office’s change of subsections relied on shows it was trying to ensure an outcome set in advance.
- c. The Home Office has not demonstrated sufficient likelihood of harm. It relies on broad and general claims of harm which are hard to refute.
- d. The Commissioner did not give sufficient weight to the public interest in disclosure. There are important human rights issues at stake, and it is very important to make all relevant facts and arguments public to further a broad and informed public debate.

9. The Commissioner’s response rejects these arguments and maintains that the Decision Notice was correct. The Appellant submitted a reply which deals with some of the points raised by the Commissioner. These arguments are addressed in the discussion below.

Applicable law

10. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) 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.

.....

2 Effect of the exemptions in Part II.

.....

- (2) 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.

.....

27 International relations

- (1) 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,
 - (b) relations between the United Kingdom and any international organisation or international court,
 - (c) the interests of the United Kingdom abroad, or
 - (d) the promotion or protection by the United Kingdom of its interests abroad.

.....

58 Determination of appeals

- (1) If on an appeal under section 57 the Tribunal considers—
- (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

11. The approach to assessing prejudice for the purposes of relevant exemptions, including section 27(1), is as set out in the First Tier Tribunal decision of **Hogan v Information Commissioner** [2011] 1 Info LR 588, as approved by the Court of Appeal in **Department for Work and Pensions v Information Commissioner** [2017] 1 WLR 1:

- a. Firstly the applicable interests within the relevant exemption must be identified.
- b. Secondly the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is “real, actual or of substance”.
- c. Thirdly, the likelihood of occurrence of prejudice must be considered. The degree of risk must be such that there is a “real and significant risk” of prejudice, or there “may very well” be prejudice, even if this falls short of being more probable than not.

12. The Upper Tribunal in *All Party Parliamentary Group on Extraordinary Rendition v IC and Ministry of Defence* [2011] UKUT 153 made it clear that appropriate weight needs to be attached to evidence from the executive branch of government about the prejudice likely to be caused to particular relations by disclosure of particular information. Similarly, as set out by the Upper Tribunal in *FCO v Information Commissioner and Plowden* [2013] UKUT 275, the international relations exemption requires the Tribunal to be cautious before rejecting executive's assessment of the likelihood of prejudice. This is because the executive has expertise in relation to foreign policy matters, and Tribunal members are unlikely to have had personal experience of the diplomatic consequences of disclosure.

Issues and evidence

13. The issue is whether section 27(1)(a) and/or (b) applies to the withheld information. This breaks down into the following issues:

- a. Is section 27(1) engaged when the requested information relates to a private non-profit organisation?
- b. If so, would disclosure be likely to prejudice relations between the UK and any other State and/or relations between the UK and any international organisation?
- c. If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

14. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents, which includes the appeal, response and Appellant's reply.
- b. A closed bundle of documents containing the withheld information.

Discussion and Conclusions

15. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

16. ***Is section 27(1) engaged?*** The Appellant argues that it is not, because Thorn is a non-profit organisation selling software to governments. He says this is a foreign non-state organisation, and all examples in the Commissioner's guidance concern state-funded actors or diplomatic relations. He challenges "*the notion that the Home Office could have revealed highly sensitive information likely to prejudice foreign relations to such a self-interested actor.*" The Commissioner says that there is no limit in the wording of FOIA that implies communications with non-state organisations are excluded, his guidance does not suggest otherwise, and the focus should be on the impact of the disclosure of the information.

17. We find that section 27(1) is engaged and can be relied on by the Home Office in relation to information about Thorn. We note the Appellant's arguments. However, there is nothing in section 27 FOIA (or the rest of the legislation) which limits the exemption to information about state organisations. It may be that the exemption is most often relied on where a state or state-funded organisation is involved, but that is not a necessary requirement. We also note that the Home

Office says that some of the withheld documents include details about meetings relating to the G7 summit and discussions with other states.

18. ***Would disclosure be likely to prejudice relations between the UK and any other State and/or relations between the UK and any international organisation?*** This divides into three questions.

19. ***What are the interests within the exemption?*** The interests within the section 27(1)(a) exemption are in preserving good international relations between the UK and other states. Damage to these relations with specific states (including the USA, G7 and Five Country Working Group Partner Nations) is the reason relied on by the Home Office for withholding the information. Similarly, the interests within section 27(1)(b) are in preserving good relations with international organisations, in this case the WeProtect Global Alliance. In both cases it is clearly in both the interests of the UK government and in the public interest for good relations to be preserved – both in relation to the important topic of online child sex exploitation and more generally.

20. ***What is the nature of the prejudice?*** The Home Office explained this in its response during the Commissioner's investigation.

- a. The Home Office has ongoing engagement with US government counterparts with an expectation of confidence. Disclosure of the requested information would reveal details of engagement with Thorn together with the UK's perspectives, including discussion around encryption and other industry or legislative developments which the US government would expect to be held in confidence. Disclosure would prejudice the ongoing engagement with the US government on this issue.
- b. Some of the information relates to the planning and ongoings of the G7 summit. Revealing sensitive information about this would be likely to prejudice the relationship with the US government and other countries represented, because it would reveal the processes of how key international engagements are facilitated and which organisations may be willing to engage and discuss these issues in the future.
- c. Similarly, discussions with the Five Country Working Group Partner Nations, which involve engagements with Thorn, took place with an expectation of confidence, and release would affect the frankness of future discussions.
- d. The WeProtect Global Alliance also exists in a confidential and safe space to share documents, perspectives and insights on this topic. The UK Government and Thorn are both represented, and disclosure of the requested information would be likely to prejudice the UK's relationship with the Alliance and its Board Members, by compromising the safe space for frank and constructive discussions.

Overall, the Home Office's position is that release of information about discussions on this sensitive subject matter, which is expected to be confidential, would make both partner states and the WeProtect Global Alliance less willing to engage frankly and openly with the UK government in the future. We are satisfied that the information provided by the Home Office shows that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is real, actual or of substance.

21. **What is the likelihood of the prejudice?** The Appellant says that the Home Office has not demonstrated a sufficient likelihood of prejudice. He questions whether the Home Office could or should have divulged privileged information to a private actor in a way that would undermine international cooperation. He makes the point that Thorn is trying to sell its own software.

22. The Commissioner makes the point that at the time of the Request there was a “live” discussion with other states and international organisations about how to balance the competing factors when designing systems to tackle online child sexual exploitation. The Commissioner maintains that the Home Office has made the assessment that disclosure would risk undermining cooperation, and that judgment should be given appropriate weight.

23. We have assessed this on the basis of whether disclosure “would be likely to” prejudice international relations. This means there “may very well” be prejudice, but this does not need to be more probable than not. Having assessed the arguments from the parties and the information from the Home Office provided during the Commissioner’s investigation, we find that this threshold is met and so the exemptions in section 27(1)(a) and (b) apply to the requested information.

24. We have taken into account the fact that discussions were live and ongoing at the time of the Request, and the sensitive nature of the subject matter. This is a topic involving the global internet where international cooperation is essential. We accept the Home Office’s position that prejudice is particularly likely because “*this is such a sensitive subject matter where there are significant topical issues being considered*” within both the UK and international forums. The Home Office says that disclosure would “*be likely to impact directly and in real time, with the publication of this information, having significant consequences for the trusted relationships between the UK government, Thorn, 5 country partners and G7 member states, and WeProtect Global Alliance, among others*”. We have also taken into account the Home Office’s expertise in the area of international and diplomatic relations, in accordance with the guidance from the Upper Tribunal.

25. We have considered the Appellant’s point that the Home Office should not have provided a private actor with information that would undermine international cooperation if disclosed. However, we note the Home Office’s explanation that it engaged with Thorn as part of wider discussions, and also that Thorn itself was involved directly with partner nations in the Five Country Working Group and with the WeProtect Global Alliance. Although Thorn is a non-profit private organisation, it is closely involved in policy discussions in this area with various countries and organisations. Its involvement is not simply based on sale of software. The risk of prejudice does not come simply from the nature of information shared with Thorn, but from the wider details of policy discussions and positions held by both the UK government and other states which would be revealed by disclosure of the requested information.

26. **Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?** The Appellant says that it does not. He says that there is a strong public interest in disclosure, particularly in relation to technical methods of monitoring which affect fundamental human rights. He makes the point that this is particularly important as the UK government is preparing to legislate in this area, and so all facts and arguments should be made available to the public to further a broad and informed public debate. He says that withholding information on lobbying by a self-interested actor such as Thorn, which is trying to sell its software to law enforcement, would further the impression that this debate is skewed towards the needs of the security and intelligence establishment. He also says that the change of subsection relied on by the Home Office shows that they did not properly weigh the arguments in favour of disclosure, and was simply trying to ensure an outcome already decided in advance.

27. There is undoubtedly public interest in this information. The issue of online child exploitation and abuse is an extremely important one, and there is interest in members of the public being able to understand what actions are being taken by government. This includes understanding which stakeholders the UK government engages with, and also the nature of those engagements. We accept that there may be particular interest in understanding the involvement of a private organisation which has a product to sell. We note the point made by the Appellant in his reply that technical monitoring for possible exploitation material has a potential impact on fundamental human rights, particularly privacy and freedom of expression, making public scrutiny important.

28. The Commissioner recognises the public interest factors referred to by the Appellant. However, he questions whether this particular information would further public debate in the way put forward by the Appellant. The information would show the state of thinking at that particular time, not the core question of how and when intervention should occur.

29. We have seen the withheld information, and have taken its content into account in judging the public interest in disclosure. We agree with the Commissioner's point that there are other, more effective ways to scrutinise the UK government's approach towards technical methods of monitoring and their potential effect on human rights, including actual proposals for reform and the public debate about proposed legislation. The Appellant is also concerned about an impression the debate is skewed. We can see his point that there is interest in finding out about the involvement of a private actor in this debate at an early stage, but again there will be opportunity for public scrutiny of the balance between monitoring and fundamental rights at a later stage.

30. The public interest in withholding the information is strong, as it is very important to ensure that future engagements with other states and international organisations are not jeopardised. As explained by the Home Office, "*It is important that the UK conforms to the conventions of international behaviour and collaboration, including maintaining confidentiality of certain discussions and potentially joint work strands, and avoiding giving offence to other nations and ensuring that we retain the trust of our international partners. To do otherwise would prejudice our ability to influence on the international stage and learn from other countries and organisations*". We find that this is particularly critical in the area of online child exploitation and abuse, which is a global issue where good cooperation between different states is essential.

31. The Commissioner concluded that there was public interest in disclosure of the information, but it would not be in the public interest for the UK's relations with international parties to be harmed while work was being undertaken in this field. We have reached the same conclusion. The public interests in disclosure set out above are outweighed by the strong public interest in preserving international relations, and in particular important international policy discussions about online child exploitation and abuse.

32. In relation to the Appellant's point that the change of subsection relied on by the Home Office shows that they did not properly weigh the arguments in favour of disclosure, we note that the Home Office's initial responses did rely on a different subsection. The reason for the change of subsection in the response to the Commissioner is not fully explained. The Home Office did, nevertheless, carry out a reasoned public interest balancing exercise in both its initial and review responses. In any case, we have carried out our own public interest balance in reaching our conclusion.

33. As a final comment, it is not clear that the Home Office initially replied correctly to the Request. The Appellant had asked for a list of meetings as well as the related documents. The Home Office responded that the information was held but was withheld under the exemptions. However, in the response to the Commissioner's investigation (page 63 open bundle), the Home Office said that they had not separated out a list of meetings as that information was not in existence. This does not change the outcome of the appeal, but it is important for public authorities to be accurate when replying to a request for information.

34. We find that the Home Office was entitled to rely on sections 27(1)(a) and (b) to withhold the requested information. We dismiss the appeal.

Signed Judge Hazel Oliver
2023

Date: 30 October