



NCN: [2024] UKFTT 813 (GRC)

Case Reference: FT/EA/2024/0074

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

**Heard: GRC Remote Hearing Rooms**

**Heard on the papers on 22 July 2024.  
Decision given: 10 September 2024**

**Panel: Brian Kennedy, Specialist members Naomi Matthews & Kerry Pepperell.**

**Between**

**ROBERT COOPER**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Representation in writing:**

For the Appellant: Robert Cooper as a Litigant in person.

For the Respondent: Nicholas Martin, Solicitor, on behalf of the Commissioner.

**Decision:** The Tribunal allow the appeal.

**Result:** The Tribunal issue the following Substituted Decision Notice; The appeal is allowed in relation to the relevant withheld information contained in the Closed Bundle and the Cumberland Council must provide the submissions and other evidence considered by the relevant panels in reaching their conclusions i.e. the withheld information that is the subject of the FOIA request in this appeal of Decision Notice IC-251460-L8W4 within 30 days of the date of the promulgation of this Judgment.

## REASONS

### Introduction:

### Factual Background to this Appeal and Decision Notice:

1. On 7 February 2023, the Appellant requested copies of submissions provided to the Independent Remuneration Panel (IRP) for their consideration. Cumberland Council (“the Council”) refused the request under section 36(2)(b)(ii) (inhibition to the free and frank exchange of views) and section 41(1)(b) (information provided in confidence) of the Freedom of Information Act; (“FOIA”).
2. The request was in the following terms: *“I write in reference to the two attached reports by the Independent Remuneration Panel for Cumberland and Westmorland and Furness respectively. The reports refer to written submissions by political groups, individual councillors and others. They also refer to other background papers and evidence. Please could you provide all of the submissions and other evidence considered by the panels in reaching their conclusions?”*
3. The Council confirmed that it held the information requested but refused to disclose it on the basis of sections 36(2)(b) and 41(1)(b) of FOIA. The Appellant requested an internal review, following which the Council upheld its original position.
4. The Appellant contacted the Information Commissioner (“Commissioner”) on 14 August 2023, to complain about the way their request for information had been handled. During the investigation by the Commissioner, some information falling within the scope of the request was disclosed to the Appellant. However, the Council continued to withhold some information under s36(2)(b)(ii) FOIA (free and frank exchange of views for the purpose of deliberation) and s41(1)(b) FOIA (information provided in confidence) to refuse the request.
5. Within the request, the Appellant requested submissions provided by political groups and individual councillors. The Council confirmed that there was only one submission by an individual Councillor, and that this was in the form of a speech presented at a public council meeting. The Council have confirmed that this submission has been provided to the Appellant.

6. The Commissioner considered that the scope of the case is to consider if the Council were entitled to apply sections 36(2)(b)(ii) or s41(1)(b) of FOIA in relation to the withheld information. The exemptions are being applied to the same withheld information, and the Commissioner considered s36(2)(b)(ii) first and, in the event that if he is satisfied this is not engaged, he would consider s41.
7. The Commissioner considered the submissions of the Appellant and the Council and determined that s.36(2)(b)(ii) FOIA was engaged, and the public interest favoured maintaining the exemption. The Commissioner's reasoning is set out in the Decision Notice ("DN") under appeal. He reminds the Tribunal that the Council also relied upon s.41(1)(b) FOIA in respect of the withheld information during the course of the Commissioner's investigation. Accordingly, if the Tribunal disagrees with the Commissioner's findings in respect of s.36(2)(b)(ii) FOIA it would be necessary for the Tribunal to consider the Council's submissions and position regarding s.41(1)(b) FOIA.
8. The parties have agreed to a hearing of this appeal on the papers. The withheld information comprises of a submission to the IRP by each of the two main political parties.

#### **The Legal framework:**

9. A person requesting information from a public authority has a right to be informed by the public authority whether it holds the information (s. 1(1)(a) FOIA) and to have that information communicated to him, if the public authority holds it (s. 1(1)(b) FOIA).
10. Those rights are subject to certain exemptions, set out in Part II of FOIA. The relevant exemptions for the purposes of this appeal are:
11. Section 36: - This section applies to: - information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and information to which this section applies is exempt information if, in the reasonable opinion of a qualified person ("QP"), disclosure of the information under this Act – would, or would be likely to, inhibit... the free and frank exchange of views for the purposes of deliberation, or would or would be likely otherwise to prejudice, the effective conduct of public affairs.

12. The QP is the person authorised as such by a Minister of the Crown - (For the Council in this appeal it is the Monitoring Officer).
13. The requirement of a “reasonable opinion” requires that the opinion be objectively reasonable and on such matters: - *“there may (depending on the particular facts) be room for conflicting opinions, both of which are reasonable”*: Guardian Newspapers Ltd and Brooke v Information Commissioner and BBC EA/2006/0011 and 0013 at [60] (Brooke) The Upper Tribunal cited the above comments in Brooke with approval in Information Commissioner v Malnick & ACOBA [2018] UKUT 72 (AAC) (“Malnick”) at [47]) and also confirmed that “reasonable” in s.36(2) means substantively reasonable and not procedurally reasonable (at [56]). The Upper Tribunal in Malnick has added: “[32] ...” The threshold question under section 36(2) does not require the Information Commissioner or the FTT to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable”.
14. Section 36 FOIA is a qualified exemption to disclosure, so far as not relating to information held by the House of Commons or the House of Lords and is therefore subject to the public interest test under section 2(2)(b) FOIA. This states that a public authority does not have to provide the information if *“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*
15. In conducting the public interest test the QP’s opinion is to be afforded a measure of respect. As Lloyd Jones LJ held in Department for Work and Pensions v Information Commissioner [2016] EWCA Civ 758 at § [55] and referred to by the Upper Tribunal in Malnick at § [29]:  
*“It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal’s own assessment of the matters to which the opinion relates.”*
16. Section 41 Section 41 FOIA provides that:
  - (1) Information is exempt information if—
    - (a) it was obtained by the public authority from any other person (including another public authority), and
    - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

17. As to whether a breach of confidence is actionable, the elements of the cause of action were summarised by Megarry J in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415,419 - "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must *"have the necessary quality of confidence about it"*. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it. Reliance on s.41 FOIA constitutes an absolute exemption by virtue of s. 2(3)(g) FOIA and is therefore not subject to a public interest test under FOIA.
18. However, and in any event, it is a defence to an action for breach of confidence that it was in the public interest to disclose the confidential information. Therefore, the Tribunal will carry out an exercise similar to the public interest test under FOIA, except that (i) the balancing exercise starts from the presumption that confidentiality should be maintained; and (ii) purely private interests in maintaining confidentiality can weigh against disclosure (*Derry City Council v Information Commissioner, IT, 8 January 2006*).
19. Because reliance on s.41 FOIA constitutes an absolute exemption by virtue of s. 2(3)(g) FOIA it is therefore not subject to a public interest test under FOIA. However, it is a defence to an action for breach of confidence that it was in the public interest to disclose the confidential information. Therefore, the Tribunal will carry out an exercise similar to the public interest test under FOIA, except that (i) the balancing exercise starts from the presumption that confidentiality should be maintained; and (ii) purely private interests in maintaining confidentiality can weigh against disclosure (*Derry City Council v Information Commissioner, IT, 8 January 2006*).

### **Grounds of Appeal:**

20. Generally, the Appellant challenges whether the s.36 exemption is engaged, and if it is, he argues the public interest balance favours disclosure. The Tribunal believe it is important to contextualise the essence of the issues raised by the Appellant in consideration of the application of the public interest test and therefore set out the detail of what we consider to be the material reasons which he has identified in that regard. He argues as follows:

*"It is conducive to the efficient use of taxpayers' money that decisions over how it is spent and the reasons behind it are scrutinised."*

*Councillors decide through a vote of full council how much they are paid. They therefore have a financial interest in that decision. The process is given legitimacy through an independent panel, which provides recommendations.*

*However, council members are able to influence this panel by making representations to it. There is a risk therefore that without the check of public scrutiny, members have a personal interest in arguing for higher pay. On the other hand, if the level of pay they argue for is justified, there is a risk that by not publishing the arguments behind it, the public will not understand the justification, suspect self-interest and lose confidence in the system.*

*Addressing the ICO's concerns about the impact of releasing the information then, the ICO's position contains an implicit assumption that councillors would not want the public to know their real views regarding allowances and would therefore feel "constrained" by the possibility of their publication. However, the opposite might just as easily be true. For example, if a councillor or group of councillors wanted to make a submission describing their activities and responsibilities, and the time spent on them and their value to the community, in order to justify a certain level of allowance, members of the public might look favourably on that information and councillors might be keen to share it, improving public confidence in the system. To take the ICO's view, one has to assume either that members of the public would not judge the councillors' views fairly, or that councillors would fear this would be the case, or that councillors would knowingly make submissions that did not stand up to public scrutiny. This relies on a cynical view of political representatives and their relationship with the public, and it can hardly be in the public interest to shield such a system from scrutiny.*

*Cumberland's remuneration panel differed from Westmorland and Furness's and an earlier panel in Cumberland as to whether members without special responsibilities should receive a full basic allowance of £12,000 during the "shadow period" in which two new unitary authorities were being established. This raises a legitimate question, worthy of public scrutiny, as to why different panels reached different conclusions.*

*The published IRP report for Cumberland does not explain in any detail the reasons for changing the recommendation to a full basic allowance.*

*Furthermore, a line from the Cumberland IRP report implies that councillors' own evidence was the key factor in the IRP deciding to recommend a full £12,000 basic allowance: "it has become clear to the Panel that the original 50% award for the Shadow Period, introduced in May 2022 by the previous Panel, does not now reflect the actual work which all members have been tasked with therefore the Panel has revised this rate to 100%."*

*I believe the public interest in releasing this information greatly outweighs any public interest in withholding it. Firstly, councillors set their own allowances, and this is an unusual, or even exceptional, situation. Public servants do not normally have such a direct financial stake in decisions they are able to make over the expenditure of public money. MPs have their pay set by IPSA, while other public sector employees have salaries set through a variety of other mechanisms. Ministers are able to change their*

*own salaries, but the process is much more constrained than that of councillors: it is governed by legislation and parliament has a role in approving updates to salaries. Central government also receives a much higher degree of public scrutiny than local government. Councillors, on the other hand, are able to raise their own allowances with a vote among themselves, with no constraint from any other body and less scrutiny than ministers would face. I would argue there is therefore an exceptionally high level of public interest in transparency around the process of setting councillors' allowances, as a check against abuse and to give the public confidence that decisions are being made for the right reasons. This should include how councillors influence the process by making representations to the IRP, whose recommendations lend legitimacy to councillors' ultimate decision. Neither the council nor the ICO has provided a commensurate argument in favour of an exceptional public interest in withholding this information; rather they have offered unsubstantiated assertions that the process would be damaged by transparency.*

*Addressing the ICO's concerns about the impact of releasing the information then, the ICO's position contains an implicit assumption that councillors would not want the public to know their real views regarding allowances and would therefore feel "constrained" by the possibility of their publication. However, the opposite might just as easily be true. For example, if a councillor or group of councillors wanted to make a submission describing their activities and responsibilities, and the time spent on them and their value to the community, in order to justify a certain level of allowance, members of the public might look favourably on that information and councillors might be keen to share it, improving public confidence in the system. To take the ICO's view, one has to assume either that members of the public would not judge the councillors' views fairly, or that councillors would fear this would be the case, or that councillors would knowingly make submissions that did not stand up to public scrutiny. This relies on a cynical view of political representatives and their relationship with the public, and it can hardly be in the public interest to shield such a system from scrutiny."*

### **The Commissioners' Response:**

21. The Commissioner submits that the appeal should be dismissed for the reasons given in the DN and in his Response dated 13 March 2024 arguing the Appellant has failed to set out, in the grounds of appeal why the Commissioner's DN is not in accordance with the law or that the Commissioner ought to have exercised her discretion differently.
22. The Commissioner did not have a copy of the QP's opinion as he was content with the submissions from the public authority which quoted the QP's opinion, (and the Tribunal have not been supplied with a copy of the QP's Opinion either).

23. In the DN the Commissioner sets out his criteria in deciding whether or not the QP's Opinion was reasonable at §§ 17 – 22 DN and explains why he found it was, as follows:

§ 19 DN- *"Firstly, representations provided by individuals to the IRP may include sensitive or personal information. The qualified person believed that any indication that such information would be released into the public domain is likely to inhibit those individuals from providing information to the IRP."* And §20 DN – *"The second is possible damage to the process. The qualified person believed that it is important that the IRP are able to carry out their role efficiently and effectively and, in order to do this, it needs open and honest representations made to it. Poor quality or a lack of representations would be likely to damage or inhibit its ability to carry out its role effectively."* Concluding at §21DN – *"The Commissioner accepts that it was reasonable for the qualified person to be of the opinion that a disclosure of all the submissions to the IRP would be likely to inhibit the free and frank exchange of views for the purposes of deliberation."* And at §21DN – *"The Commissioner's conclusion is therefore that the exemption provided by section 36(2)(b)(ii) is engaged"*.

#### **The Public Interest Test as assessed in the DN:**

24. In his consideration of the Public Interest Test issues, the Commissioner essentially gave weight to the QP's Opinion per se in favour of non-disclosure and further finds at § 25 DN – *"There is a strong public interest in allowing full and frank discussions to take place in order that the panel can provide fully informed recommendations to the Council. If individuals were concerned that their submissions to the panel would be made public, they may be less willing to take part in the process. - "and at § 26 DN "If individuals felt constrained in submitting their opinions to the IRP, this may harm the panel's effectiveness, leading it to be less able to provide good quality recommendations to the Council and this would not be in the public interest."* And at § 27 DN – *"The IRP is an advisory panel providing recommendations to the Council about the annual allowances paid to members. These recommendations are not binding on the Council."* And at § 28 DN – *"Whilst this advisory status may indicate that the severity, extent and frequency of the inhibition that the qualified person believed would be likely to result is reduced, and hence so is the weight of the public interest in favour of maintenance of the exemption. That the withheld information does not contain anything that has a binding effect upon the Council might also be cited as reducing the weight of the public interest in favour of disclosure."* The Commissioner concluded at §§ 25 & 29 DN respectively : - *"However, the Commissioner is of the opinion that the balance of the public interest lies in favour of withholding submissions provided to the IRP, because doing so will mean it can retain its effectiveness in providing good recommendations to the Council"* and *"The*



*Commissioner's conclusion is that the public interest in the maintenance of the exemption outweighed the public interest in disclosure of the withheld information. Therefore, the Commissioner's decision is that the Council was entitled to refuse the complainant's request on the basis of section 36(2)(b)(ii)."* The Commissioner therefore did not go on to consider s41.

**Discussion:**

25. Regrettably the Panel are bereft of the QP's Opinion but accept the requirement of a "*reasonable opinion*" requires that the opinion be objectively reasonable and, on such matters, and that "reasonable" in s.36(2) means substantively reasonable and not procedurally reasonable. We accept that the threshold question under section 36(2) does not require the Information Commissioner or the FTT to determine whether prejudice will or is likely to occur, that being a matter for the QP. We recognise that the threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable and given that there is no evidence to establish it is absurd we do not challenge the Commissioners reasoning in finding section 36(2)(b)(ii) is engaged.
26. However, in relation to the Public Interest Test, we differ in our conclusions. While we recognise in general terms, and give weight to the factors identified, by the Commissioner in favour of non-disclosure as set out in the DN (see § 24 above herein), every case must be decided on its merits. In all the circumstances of this case, we find a fair and proper analysis of the arguments in the Grounds of Appeal (see § 20 above) provide significant weight to the public interest in favour of disclosure of the withheld information. The DN does not, in our view give sufficient credit to this weight.
27. We find the Appellants arguments compelling in support of disclosure and we accept and adopt the premises on which they are submitted. We find, as submitted by the Appellant that they outweigh the arguments relied upon by the Commissioner in favour of non-disclosure. In the circumstances of this case, we find there should be public scrutiny over how such matters as e.g. remuneration in the public sector is calculated and formulated, especially when representations to the IRP can be made by interested parties and voting on remuneration package can occur within. (Repetition for the sake of emphasis see §20 above in light of the overriding public interest in transparency and accountability arising).
28. In relation to the QP's Opinion, we are surprised and disappointed that it was not included in the papers prepared for the hearing. It should have been.

However, as seen above we are prepared to accept the Commissioners' view that s36 is engaged.

29. The Panel considered carefully the material issues pertaining to the public interest test as they respectively, directly and indirectly (see § 19 above) come into play in both s36 (a qualified exemption) and s41 (an absolute exemption) and weighed the balance as described and suggested by the Council in their correspondence dated 13 April 2023 (C49 - 52 of the Open Bundel).
30. In what could be described as an exercise in lobbying for remuneration options in various forms, the withheld information related to pay and conditions for elected officials in public service. Positions in this sphere should and do expect a high level of scrutiny in relation to such matters. The Public are entitled to be aware of and understand the process that undermines the remuneration and conditions which pertain or are proposed for change. A fair and proper assessment of such matters very clearly carries significant weight in the public interest even if they are not approved. Indeed, the fact that they are, or are not approved and the reasons for such decisions further inform the public with the necessary transparency and accountability that FOIA is engaged to provide.

#### **Section 41:**

31. In relation to the exemption purportedly afforded by s41, we cannot see an actionable breach of confidence. The information was given as part of a call for opinions by the IRP which later made its recommendations on those opinions.
32. We see no evidence and do not accept that the three-part test as set out at §17 above herein are applicable in the circumstances of this case. We do not accept that the information itself has been imparted in circumstances importing an obligation of confidence and nor would it be an unauthorised use of that information to the detriment of the party communicating it. There is no evidence to support these assumptions in the circumstances of this case.
33. Having reviewed the Closed material provided for this appeal, we find no individuals personal data, save only for a name of a person in high office who ought not expect to have his name redacted.

#### **Conclusion:**

34. Accordingly, on hearing this appeal afresh, on all the material evidence before us and for the reasons given above, we allow this appeal and make the above Substituted decision.

**Brian Kennedy KC**

**04 September 2024**