



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2012/0251

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50406325
Dated: 26 November 2012**

Appellant: BRADFORD & BINGLEY ACTION GROUP

First Respondent: INFORMATION COMMISIONER

Second Respondent: CABINET OFFICE

Heard at: VICTORY HOUSE, HOLBORN, LONDON

Date of hearing: 17 APRIL 2013

Date of decision: 10 JUNE 2013

Before

ROBIN CALLENDER SMITH
Judge

and

RICHARD FOX and DAVID WILKINSON
Tribunal Members

Attendances:

For the Appellant: Mr David Blundell on behalf of the Bradford & Bingley Action Group (BBAG)

For the First Respondent: Mr Robin Hopkins, Counsel instructed by the Information Commissioner

For the Second Respondent: Ms Christina Michalos, Counsel instructed by TSol

Subject matter:

FOIA

Qualified exemptions

- Formulation or development of government policy s.35 (1) (a)
- Ministerial Communications s.35 (1) (b)
- Operation of Ministerial private office s.35 (1) (d)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 26 November 2012 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. On 9 March 2011 Mr David Blundell – acting on behalf of the Bradford and Bingley Action Group (BBAG) - wrote to the Cabinet Office asking for information about the sequence of events leading up to and after the nationalisation of Bradford & Bingley (B&B) in 2008. He also wanted to know whether the matter was discussed and recorded at meetings of the Cabinet.
2. BBAG believed – as set out in the Grounds of Appeal – that the nationalisation of B&B was “deeply flawed, misguided and made in haste for political reasons” and “unnecessarily disadvantaged nearly 1,000,000 share and bond holders”. Also that the Government had provided

£61 billion of covert support to Royal Bank of Scotland (RBS) and Halifax Bank of Scotland (HBOS) only days after the B&B nationalisation.... despite those two banks having far weaker balance sheets than B&B.....
3. The Cabinet Office responded on 10 October 2011, refusing to provide the information requested and relying upon the exemptions under sections 29(1)(a); 35(1)(a) and 35(1)(b). This position was upheld by the Cabinet Office following an internal review.
4. The Appellant challenged that decision to withhold the requested information. During the Information Commissioner’s investigation, the Cabinet Office also sought to rely upon section 35(3) as a basis for

refusing to confirm or deny whether it held any records of cabinet discussions of the nationalisation of Bradford & Bingley ('B&B').

The request for information

5. On 9 March 2011 the Appellant wrote to the Cabinet Office requesting the information in the following terms:

I enclose BBAG's latest Update No. 10 and would draw your attention to paragraph 2 in the reply of the Cabinet Office to a request for full details of the sequence of events pre and post the nationalisation of B&B under the FOI.... [Reference was then made to information in Gordon Brown's book *Beyond the Crash* as evidence which contradicted a previous denial by the Cabinet Office that information was held].... So we were told there were no files but what about the emails, faxes, telephone calls and meeting notes assuming the latter were not shredded? I would appreciate full details of all evidence pertaining to this matter from the Cabinet Office under the FOI. It is my understanding that the Cabinet discussed the nationalisation of Northern Rock but not B&B. If this is so, and there are no files, confirmation that members of the then Cabinet never received briefing notes nor formally discussed and approved the nationalisation of B&B will also be helpful.

The complaint to the Information Commissioner

6. The Commissioner noted considerable delays on the Cabinet Office's part in responding to the Appellant and – at one point – threatened to issue an Information Notice under s.51 FOIA in order to obtain a response.
7. The Decision Notice records (Paragraph 14) that the Commissioner was “extremely disappointed” that such delays had arisen particularly given that delays experienced by the Appellant when the initial request had been made and in his request for an internal review.
8. The Commissioner dealt with the request as one for two sets of information of which one was a sub-set of the other. He regarded the primary set of information as that which recorded “full details of the sequence of events pre-and post the nationalisation of B&B”. The secondary set of information was the request for information showing

whether “members of the then Cabinet [ever] received briefing notes [or] formally discussed and approved the nationalisation of B&B”.

9. He noted that the Cabinet Office’s position was that it had confirmed it held recorded information within the scope of the primary set of information but argued it was not obliged to provide this because of FOIA exemptions. The Cabinet Office had drawn attention to the fact that the UK government was still dealing with the economic aftermath of the credit crunch and, although the decision to nationalise B&B had been taken some time ago, the policy-making process dealt with in the withheld information was still alive.
10. In terms of the secondary set the Cabinet Office had refused to confirm or deny whether it held records such as briefing notes or minutes of meetings which showed whether the Cabinet had formally discussed or approved the nationalisation of Bradford and Bingley.
11. The Commissioner decided that the primary information was exempt under s.35 (1) (a), with some of it also being exempt under s.35 (1) (b).
12. In terms of the public interest test, he noted the Appellant had set out a number of arguments in favour of disclosure. The Commissioner characterised the public interest test in the case as “finely balanced”. The Appellant had set out a number of compelling arguments in favour of disclosure. The Commissioner noted the controversial part played by the implementation of IAS 39 in the banking crisis, and that it had been discussed by the House of Lords Economic Affairs Select Committee, suggesting that the Appellant’s concerns were not purely speculative.
13. The Commissioner noted the fact that a Rights Issue had been approved by the regulatory authorities shortly before B&B was nationalised and acknowledged that nationalisation was a dramatic step for any Government to take, particularly given the trend towards privatisation that has been ongoing since the late 1970s under successive governments.

14. It would not have been possible to conduct a Rights Issue without proper authorisation. The tripartite regulatory system in operation at the time of the events had been the subject of considerable controversy. It was heavily criticised in a House of Lords Economic Affairs Select Committee report in 2009 (prior to the request). The current Chancellor, George Osborne, had acknowledged the need to reform the regulatory system following the LIBOR scandal.
15. Although the LIBOR scandal is not directly related to the Appellant's concerns, the comments of the Select Committee and the Chancellor showed that the Appellant's concerns about the tripartite regulatory system were not purely speculative.
16. There was a compelling public interest in disclosing the information covered in the primary request because it would provide a first-hand illustration of a key event in the banking crisis of 2008. The decision to nationalise B&B was not expected by the previous owners, its shareholders, given the recent Rights Issue. It had produced an extremely negative outcome for B&B's shareholders, in that they received no compensation.
17. The Commissioner agreed, however, with the Cabinet Office that the policy matters referred to in the information remained live. The financial services sector was a key contributor to the UK economy. As such, there was a very strong public interest in protecting the safe space within which members of the government and their officials could discuss how to tackle the ongoing difficulties faced by the UK economy. Protecting a safe space for discussions could improve the quality of decision-making at the heart of Government.
18. Considering the information which constituted Ministerial communications, the Commissioner accepted that there was also compelling public interest in preserving the convention of collective responsibility. That would be undermined by disclosure. Preserving the convention of Collective Cabinet

Responsibility allowed the Government to be able to engage in free and frank debate in order to reach a collective position, and to present a united front after a decision has been made. This is particularly relevant where the policy matter under discussion was still live or was very recently completed as is this case.

19. The Commissioner concluded that the public interest favoured maintaining both these exemptions by a narrow margin. He recognised the compelling arguments in favour of disclosure presented by the Appellant. However, he gave particular weight to the Cabinet Office's argument that information contained policy matters which were still being formulated and/or developed.

20. With respect to the information which constitutes Ministerial communications, he has given particular weight to maintaining the convention of collective responsibility.

21. In respect of the secondary request, and s.35 (3), that provides that:

the duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of [section 35] subsection (1)

22. The practical consequence of that was that if the information described in the secondary request fell within the descriptions of information set out in s.35(1), the Cabinet Office could refuse to confirm or deny whether it held it, subject to a balance of public interest test.

23. The information described in the secondary request was any recorded information (such as briefing notes or minutes) showing that the nationalisation of B&B was discussed by the Cabinet. The Commissioner was satisfied that such information, if it were held, would fall within the descriptions of information set out in s.35(1) and that s.35(3) was engaged.

24. The Cabinet Office could only maintain this exclusion from its duty to provide confirmation or denial where the public interest in doing so outweighed the public interest in disclosure.
25. The Commissioner believed the matter was finely balanced but concluded that, given the fact that the events in question were relatively recent, the Cabinet Office's arguments were more compelling. The Cabinet Office was entitled to refuse to confirm or deny whether any records of Cabinet discussions were held. The Commissioner accepts that it is for the Cabinet and the Government to determine the level at which matters are discussed and that process, in itself, deserved protection. If confirmation or denial of the level at which decisions are made were routinely provided, this would inevitably lead to pressure on the Government to make more decisions at the highest level.
26. The Commissioner was concerned that the Cabinet Office was seeking to elevate s.35 (3) to an absolute exemption - not subject to a balance of public interest test - whenever requests of this nature were made. There had to be circumstances when confirmation or denial as to whether the Cabinet discussed a matter would be in the public interest. Here, however, the fact that the nationalisation of Bradford and Bingley was a relatively recent event and the financial services sector was still subject to difficulties which require Government attention, the Commissioner concluded that the public interest favoured maintaining the exclusion at s.35 (3). That conclusion was reached by a narrow margin given the unusual nature of the decision to nationalise Bradford and Bingley and the serious consequences of doing so for many of the bank's shareholders.

Evidence

27. The Tribunal has considered written witness statements presented on behalf of the Appellant from Jonathan Michael Bloch, the founder, majority owner and CEO of Exchange Data International Ltd, and Mr Lindsay McKinlay a former Chairman of the Bradford and Bingley Building Society from 1995 until the end of 2002.
28. The Tribunal heard oral evidence from Stephen Muers – on which the Appellant was able to cross examine in the Open portion of the appeal – and on which the Tribunal was able to ask questions in the closed session of the appeal.
29. Mr Muers holds the position of Deputy Director in the Economic and Domestic Affairs Secretariat responsible for Cabinet Committees, legislation and public services where he had been working since 2011. He had previously held various positions within the Cabinet Office and other Government departments. He had no direct historical knowledge of the nationalisation of the B&B but had relied on information and documentation made available to him from the Cabinet Office case file and from consultation with other Government departments.
30. He acknowledged that the release of the requested information would provide additional information about the UK's conduct of economic policy and its response to the 2008 crisis. He believed, however, that those considerations were outweighed by the serious prejudice to the sovereignty of Cabinet policy-making – and the convention of collective Cabinet responsibility – and the other types of prejudice covered by the exemptions which would flow from the disclosure of the information.
31. In situations like this that could entail the disclosure of sensitive information including commercially sensitive information it was necessary for Ministers and their advisers to be able to speak frankly to each other on the basis that their advice would be held in confidence. The need for

trust was even greater than in the usual processes of policy-making and certainty about the confidentiality of the information and advice exchanged needed to be guaranteed so that Ministers and their advisers could speak honestly, freely and unequivocally about the issues under consideration. Confidentiality was the Ministers' guarantee that the advice offered was not hedged or restrained by perceptions of how the advice would appear if it was made public.

32. When the economy was in a critical condition the chilling effect of release was brought into sharp focus. The harm to policy development is aligned to the potential economic impact if Ministers and their officials are constrained in providing advice on sensitive policy matters. The discussion of options of support or change in relation to the banking sector was – by its nature – always sensitive, particularly where options that were not selected might need to be revised or revisited.

33. Although the information related to the end of 2008 and 2009, the Government might need to consider and draw upon a similar range and mix of policy options in the future. The extreme volatility in the financial and banking sector might have lessened to a degree but there remained the potential for instability. The sovereign debt crisis affecting Europe highlighted the uncertainties that still existed. In those circumstances it was important to be able to discuss and develop policy – which would include developing contingency plans and options.

34. In his view, disclosure about how the Government took the decision to nationalise B&B would hinder any government dealing with similar crises in the future. Cabinet responsibility arose from decisions reached at full Cabinet meetings, at committee meetings and at meetings of small groups of Cabinet ministers.

35. Following Mr Muers' oral evidence – and the questioning on it by the Appellant in open session – it was agreed in the closed session that

further information (in Paragraphs 36 – 42 below) could be relayed to the Appellant when the open hearing resumed.

36. Tribunal Member David Wilkinson had indicated that he used to work in the Cabinet Office and Tribunal Member Richard Fox had stated that, before he retired, he had started off in banking and then did compliance for various financial institutions.

37. Prior to the Appeal beginning I had disclosed to all parties that one of my roles was as a Deputy Chairman of the Regulatory Decisions Committee of the Financial Conduct Authority, formerly the Financial Services Authority, and that I had had no dealings with anyone at B&B or been involved in any of the issues under appeal.

38. In closed session Mr Wilkinson had asked Mr Muers how his evidence squared with the fact that Mr [Gordon] Brown had revealed to the world how decisions were taken in his book. The reply was:

Ministers do not want to feel advice is released to see with no control over that. They wouldn't want advice or other things written down that would result in a poorer quality of decision-making. Why the [former] Prime Minister has put something in a book I don't know.

39. Mr Fox asked – given that the banking crisis was such a big event – whether there had been a reflective review of how things were done and how they could be done better? The reply was:

I don't know.

40. Mr Fox asked:

In Para 8 it says “Immediately after this transfer, the retail deposit book and branch network were transferred to Abbey National plc (now Santander) following a competitive process”. What is “immediately”? Was it the next day?

41. The answer was:

I don't know. I'm not aware of what the process was.

42. The Tribunal had also been referred to the letter at p.65 from the Cabinet Office to Mr Blundell dated 3 January 2013 directing his attention to other public authorities which might hold information relevant to the request.

The substance of the Appellant's case

43. Mr Blundell summarised his position – and that of B&B's Shareholder Action group – from the points he had made in his Grounds of Appeal. In brief, these were:

- The decision to nationalise B & B was a mistake, made in haste for political reasons, and contrasted with the decisions made in respect of the RBS and HBOS.
- He was concerned about the operation of the International Accounting Standard 39 (IAS 39) adopted by the Government in 2002 which “enabled the banking industry to indulge in what many believe was false accounting”. That added weight to the argument for greater transparency about the formulation and development of the Government's policies with regard banking industry.
- BBAG had appealed to the Upper Tribunal (Tax & Chancery Chamber) in respect of the valuation decision but the Judge had allowed HM Treasury to withdraw from the proceedings enabling it to avoid scrutiny of its role in this matter.
- BBAG believed that HM Treasury had been at fault in the banking crisis together with the Bank of England and the FSA, a view reinforced by a ' public blame game' that had developed between them. There was strong evidence to suggest close links between HM Treasury and a well-known BBC journalist whose negative comments in respect of B&B in the press and media caused a run on the savings bank and a false market in its shares and bonds.
- B&B's auditors had signed off the 2007 Report & Accounts, a dividend was paid followed by the completion of a successful rights issue at 55p a share approved by the FSA less than eight weeks before the nationalisation. Extensive audit work by KPMG on the rights issue and the interim results announced on the 29 August 2008 supported a solvent, well-capitalised bank with net assets of £1.00 a share and a Tier 1 capital ratio of 9.1%, far stronger than RBS and HBOS who received £61bn of support only days after the B&B nationalisation.

- B&B had been one of the best capitalised banks in the UK. That message was reinforced in a B&B press release on the 25 September 2008, a day before the decision to nationalise B&B was taken by Gordon Brown from an ante-room of the White House Oval Office in a telephone conversation with Alistair Darling.
- No explanation had been given about why B&B's savings book was sold to Santander at a fire sale price. In statements since then the latter has stated several times that this purchase had an extremely positive effect on its profitability.
- It was over four years since the nationalisation of B&B. The Coalition had restated its determination to continue on its current course several times. The passage of time would suggest the public interest debate favoured B&B in disclosing information about its nationalisation as Northern Rock has been sold and, based on the accounting trends, there would be a surplus when B&B was finally wound down which would pass to HM Treasury and not the original shareholders.
- The decision to nationalise B&B was neither proportionate nor equitable and was a prime example of what went wrong during that period. The Government should have acted justly, swiftly and equitably to support B&B's shareholders' interests in line with other investors in other banks and as UK taxpayers who had recapitalised the banks.
- If a Government confiscated the property of its citizens without reason, explanation or fair compensation - particularly when it might be seen as being at fault to some extent by the failure to adequately regulate these companies - then all concepts of democracy and equity were laid aside and the role of fair and honest Government was devalued.
- Given the passage of time, full disclosure of the information requested would provide the platform for decisive action to improve standards of corporate governance, regulation and Government.

Conclusion and remedy

44. The Tribunal has decided that its decision in respect of this appeal needs no Closed Annex because the withheld information – considered by it in Closed session – will not be referred to save as in Paragraphs 36 – 42 above.

45. The Tribunal has been able to make its decision on the basis of the Open evidence it has heard and considered in respect of the primary and secondary information requests.
46. Paragraphs 9 – 27 (above) set out in considerable detail the balancing exercise and factors he considered before concluding that s.35 (1) (a) and (b) and s.35 (3) narrowly favoured the requested information being withheld or neither confirmed or denied. The Tribunal notes the rigor of his analysis in respect of both parties.
47. The decision to nationalise B&B was taken urgently in emergency conditions when the economy was in a critical condition.
48. The argument that the detail of scenarios that needed to be considered in the B&B situation may have to be revisited in the future by Ministers and their advisers is a powerful one and is the most significant factor in the Tribunal reaching the decision it has.
49. It tips the public interest in withholding the requested information in the Second Respondent's favour despite the fact that the events that form the core of this appeal occurred in 2008.
50. The Tribunal's attention was drawn to a series of cases enunciating certain principles to be considered in appeal such as this and has noted them. It would have arrived at the conclusion it has without such decisions.
51. In terms of the particular information that is being withheld the Tribunal has focused on that rather than on more generalised public interest arguments about the underlying issues.
52. As comment, it is clear that the Cabinet Office is unlikely to hold all the information about this nationalisation decision – which was legally a matter for HM Treasury – and information is likely to be held there as well as the

Foreign & Commonwealth Office and the Department for Business, Enterprise & Regulatory Reform.

53. It is also clear that the policy issues underlying these requests were live at the time requests were made. It will be up to the Government to decide in due course how best to use B&B's assets on the public's behalf. The withheld information continues to require the protection of a "safe space". The financial services sector in the United Kingdom remains a key contributor to the UK economy.

54. In terms of the "neither confirm nor deny" (NCND) response to the secondary request - praying in aid s.35 (3) - the Tribunal agrees that public disclosure of whether the Cabinet formally discussed and approved the nationalisation decision would intrude upon the Cabinet's discretion to decide how such decisions are made, a matter of particular importance during periods of fast-moving financial crises.

55. As Counsel for the Commissioner pointed out at the appeal, this is because the Cabinet's involvement in a decision would be interpreted (rightly or wrongly) as illustrating the seriousness and importance of that decision.

56. That in turn would tend to create expectations or pressure for certain types of decisions to be taken Cabinet level. That would be an intrusion on the Cabinet sovereignty in this regard. There is also a clear and considerable public interest in abiding by and upholding the Ministerial Code.

57. For all of these reasons the Tribunal is unanimously satisfied – on the balance of probabilities - that the Appellant's appeal in respect of both information requests must fail.

58. There is no order as to costs.

Robin Callender Smith

Judge

10 June 2013