



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL**  
**(INFORMATION RIGHTS)**

EA/2013/0287 & 0288

**B E T W E E N:-**

**DEPARTMENT OF ENERGY AND CLIMATE CHANGE**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**Respondent**

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**Tribunal**

**Brian Kennedy QC**  
**Marion Saunders**  
**Michael Hake**

**Hearing:** 17 July 2014 (Field House London), 11 August 2014 & 15 October 2014, 15 May 2015 & 30 July 2015.

**Location:** Fox Court, London.

**Decision:** Appeal Refused.

**Appearances:**

Appellant: Kate Olley of Counsel.

Respondent: Heather Emmerson of Counsel.

**Subject Matter:** Public Interest in disclosure of the disputed information in maintaining the exemption, under 35(1)(b) of the Freedom of Information Act

200 ("FOIA"), or in the alternative under the exception under regulation 12(4)(b) of the Environmental Information Regulations 2004 ("EIR").

Result: Appeal Refused.

### **Introduction:**

**1]** This is an appeal against two Decision Notices ("the DN's") and issued by the Information Commissioner ("the Commissioner") both dated 3 December 2013, (References FER0486845 and FER0489836) involving the Department of Energy and Climate Change ("the DECC"). Each DN related to a request for information made to the on 26 November 2012. The appeals were consolidated on 8 January 2014. This Tribunal, at short Notice, dealt with an oral hearing on 11 August 2014 and subsequent adjourned deliberations on 15 May 2015 and 30 July 2015. The Tribunal was assisted by, detailed submissions from the parties on 15 October 2014, helpful guidance from the Upper Tribunal Decision in GIA/1313/2014 in an appeal to the Upper Tribunal from the First Tier Tribunal in the case of The Cabinet Office V Information Commissioner, promulgated on 20 October 2014, and further submissions from the parties herein, with the final deliberations of this Tribunal scheduled at Fox Court London on 30 July 2015.

### **Background:**

**2]** The background to these appeals arises on the 23rd of November 2012 when the Guardian newspaper carried an article in which the then Secretary of State for energy and climate change, Ed Davey, revealed that he had asked the Prime Minister, David Cameron, to remove responsibility to green energy Minister of State for energy John Hayes MP.

**3]** As a result of this article, two journalists, Leo Hickman and Martin Rosenbaum, made requests for information in relation to the said article.

**4]** Together the two requests ("the requested information") concerned the following categories of information:

(a) A letter from the Secretary of State ("SoS") for Energy and Climate Change to the Prime Minister ("PM") about the DECC's responsibilities of one of the Secretary of State's ministers (both Mr. Rosenbaum and Mr. Hickman's requests), and the Prime Minister's reply (if any), (which was Mr. Rosenbaum's request only);

(b) **Legal Advice** given to the Secretary of in relation to one of his Ministers; (Mr. Hickman's request only)

(c) **Specific communication** between HM Treasury and issued its refusal notices. in relation to a particular policy are; (Mr. Hickman's request only);

(d) All and any **general communications** between or among government Ministers in relation to a particular policy, during a specific Minister's service; (Mr. Hickman's request only).

**5]** On 21 December 2012, the DECC issued its refusal notices. In relation to Mr. Hickman's request the DECC, refused to disclose any of the information, relying on section 35(1)(a) and (b), and s.42 FOIA, and regulation 12(4)(e) EIR.

In relation to Mr. Rosenbaum's request, DECC refused to disclose the information, citing section 235(1)(a) and (b) FOIA.

**6]** Both Mr. Hickman and Mr. Rosenbaum complained to the Commissioner challenging DECC's decision to withhold the requested information.

**7]** The Commissioner contacted the DECC in relation to both complaints on 2 July 2013, with a further response sent in relation to Mr. Hickman's complaint on 26 July 2013.

**8]** In his DN's the Commissioner found;

(a) In relation to the letter from the SoS to the PM, while the exception at r12(4)(e) EIR was engaged and the public interest maintaining the exception was outweighed by that in disclosure. The Commissioner ordered disclosure of the letter. In respect of Mr. Rosenbaum's request the Commissioner also ordered DECC to confirm whether or not there had been a reply to the letter.

(b) The Legal advice was exempt information under r12 (4)(e) EIR and the public interest in maintaining the exception outweighed that in disclosure.

(c) In respect of the specific communications, the Commissioner found that the information in one document (referred to in DN FER0486845 as "Document 2") was exempt under r12(4)(e) EIR, and that the public interest in maintaining the exception outweighed that in disclosure. The Commissioner found however that, although information in the other document (referred to in DN FER0486845 as "Document 3") was exempt under r12(4)(e) EIR in relation to some of the information, the public interest in maintaining the exception was outweighed by that in disclosure. The Commissioner ordered disclosure of those parts of "Document 3"; and

(d) In respect of the general communications, the Commissioner found that r12(4)(e) EIR was engaged, but that the public interest in maintaining the exception was outweighed by that in disclosure. The Commissioner ordered disclosure of "Document 4 and 5" (as described in DN FER0486845).

**9]** The Commissioner found that the names and contact details of junior officials (in this case defined as officials below the grade of senior civil servant) were personal data and it would be unfair to disclose that information. (See Para's 64-66 DN FER0486845). The Commissioner found however that it would not be unfair to disclose the department from which document 3 was sent (See Para 33 DN FER486845).

**The Notice of Appeal:**

**10.]** In their Grounds of Appeal the DECC make the following points;

- (a) The Commissioner erred in deciding that the information in the letter ("the Disputed Information") was "environmental information" such that, had the Commissioner found the letter was not "environmental information", he would have found that s35 (1)(a) and (b) FOIA were engaged and that the public interest in maintaining the exemption outweighed that in disclosure (Ground 1); and
- (b) As regards documents 3, 4 and 5, the Commissioner was right to find that the information was "environmental information" and that the public interest test favoured withholding the information (Ground 2).

**The Issues:**

- A) Whether the Disputed Information is "*environmental information*" as defined in regulation 2 of the EIR with the effect that the request falls to be determined under EIR rather than FOIA, and,
- B) Whether the Disputed information is exempt from disclosure pursuant to either r 12(4)(e) of the EIR (internal communications) or s 35(1)(a) (formulation of policy) or s 35(1)(b) (ministerial communications) of FOIA.

**Relevant Law:**

**11]** The Environmental Information Regulations 2004 ("EIR") gives effect to EU Directive 2003/4/EC. "Environmental Information" is to be construed broadly so as to give proper effect to that Directive on public access to environmental information, which in turn reflects the wording in Article 2.3 of the Aarhus Convention.

**12]** Regulation 5 of the EIR imposes a general obligation on a public authority, which holds environmental information, to make that information available on request (subject to various exceptions set out in the EIR).

**13]** Environmental Information is defined in regulation 2 in the following terms:

*"environmental information has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural electronic or any other material from on –*

- a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements:*
- b) *factors, such as substances, energy, noise, radiation waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- c) *measures (including administrative measures), such as policies, legislation, plans, programs, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures of activities designed to protect these elements:*

**14]** Section 1 (1) of FOIA makes provision for any person making a request for information to a public authority to (a) be informed in writing by the public authority whether it holds information of the description specified and (b) if so, to have that information communicated to him.

**15]** Section 2(2) provides that in respect of any information which is exempt information by virtue of Part II of the Act, the right to have information communicated does not apply to the extent that “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

**16]** The principal exemption relied on by the Appellant is s 35, which, in so far as material provides as follows:

Information held by a Government Department is exempt if it relates to: -

- (a) The formulation or development of government policy.
- (b) Ministerial communications.

Section 35 is a qualified exemption to which the public interest balancing exercise applies. S 35 does not create a presumption of a public interest in non-disclosure.

Section 35(1)(b) FOIA (ministerial communications) and  
Section 35(1)(a) FOIA (formulation or development of Government policy).

### **Engagement of EIR:**

**17]** The Tribunal find that the disputed information is not environmental information under EIR.

### **Reasons:**

- a) The Commissioner has set out his reasons at paragraph 13 of the DN (Hickman) [OB/G22] and paragraph 13 of DN (Rosenbaum) [OB/N/51]. The Respondent argues essentially that the subject matter in issue within the disputed information is about the removal of a Minister from certain areas of his responsibilities and cannot be a measure likely to affect the environment. The appellant argues this connection is too remote and the Commissioner has erred in holding that the information at issue is environmental information as defined in EIR r 2.
- b) The Tribunal accepts that Environmental Information is to be construed broadly so as to give effect to the purpose of the Directive 2003/4/EC on Public Access to information and see R V Secretary of State for the Environment Env. LR 447 AT 470. EIR covers any policies' likely to affect the environment and the language of 2(1) shows that it also applies to measures including administrative measures or activities' likely to affect the environment.
- c) However the Appellant argues that the issue here within the disputed information was an individual's job role as a result of his conduct and "very much" concerns internal Departmental discipline".
- d) The evidence on behalf of the Appellant accepts the disputed information is principally about Ministerial portfolios and the conduct of a particular minister and is "essentially" concerning a matter of internal Departmental discipline (see paragraph 32 of the Respondent's skeleton argument). The primary focus of the letter, they argue relates to the consequences of his conduct. They argue that this "most tangential" link between the presence of Mr. Hayes and some possible effect (not even a likely effect) on the Environment is too far removed from the issues raised in or flowing from the disputed information. We accept this argument
- e) We find the focus of the letter is on the conduct of the minister and it is essentially a matter of governance. We have considered carefully all the arguments made on behalf of the parties and are of the view that it is correct to say that the primary focus and the general thrust of the letter was about ministerial conduct of a personal nature and also involved collective cabinet responsibility. Whilst we accept that it must be considered in its overall factual background, its context and substance as a whole, we are not persuaded that the disputed information, or its implication, amounts to or constitutes a "measure" or "activity" as defined in EIR (2)(c). We do not accept that the disputed information can be considered an administrative measure within EIR r 2, in that it was about governance and the possible containment of the individual views of a minister. We agree that the link between the presence of Mr Hayes, in the circumstances and context of the disputed information, and some possible (not even likely effect) on administration or policy is too remote from activities envisaged or arising under EIR r 2.

- f) On the facts of this particular case, we do not accept that the disputed information contains measures, (even indirectly) which affect or are likely to affect factors affecting the elements of the environment. We accept the Appellants submissions that there is no certainty of any legal challenge in this case and if the putative legal challenge arose there would be no certainty of outcome that would have affected the implementation of policy.
- g) The evidence from Lord O'Donnell, a retired senior civil servant called on behalf of the Respondent, was that the policy behind the draft bill was, ready, agreed and had been decided. In these circumstances there can be no suggestion that policy changes would be likely.

## **18] FOIA**

- a) In this event it is the exemptions under FOIA, which have to be considered, and in either event (EIR or FOIA) public interest arguments in favour of disclosure or non-disclosure must be considered. It is common case that the relevant factual matters pertaining, apply to either regime
- b) The Tribunal find that while s 35(1)(a) of FOIA arguably could be engaged, in that Mr Davey was quoted discussing the formulation or development of government policy (see paragraph 56 of the Commissioners closing submissions of 27 August 2014), this information is already in the public domain in circumstances where his revelations were unusual if not unique, and of his own making, and relate principally to the issue as to which Minister will have Departmental responsibility for implementation and development of a policy (rather than formulation and development of a particular policy, a policy which had already been adopted) and the reasons for this. The Respondents do not actively pursue this exemption and for the avoidance of doubt we find it is not relevant to this case. If we are wrong about that, we find the public interest test would apply in favour of disclosure as with the other exemptions (or exception) under discussion in this case for the reasons given herein.
- c) Accordingly the remaining issue as at 10] B) above is whether the public interest in favour of disclosing the Disputed Information is outweighed by the public interest in maintaining the exemption at s 35 (1)(b) of FOIA.

## **19] Public interest in favour of Disclosure:**

We have considered the Public interest arguments, which we feel are relevant and we find that the limited public interest factors in favour of maintaining the

relevant exception or exemptions are outweighed by the strong public interest factors in favour of disclosure.

**Reasons:**

- a) We accept and adopt the helpful analysis made by the Commissioner at paragraph 38 of his Skeleton argument of 4 August 2014 of what is already in the public domain.
- b) We also accept and adopt the further submissions in that Skeleton at paragraphs 40, 41, 42 and 43, which are all arguments in favour of disclosure.
- c) While the Tribunal have found that the disputed information does not engage EIR and matters relating to the implementation or development of government policy, it is common case that it is principally about a minister speaking out of order and very much about issues of disciplinary matters arising. This important background to the circumstances herein makes this case different in that there is, in our view, a greater emphasis on the need for transparency and accountability.
- d) The case is unique in that the minister disclosed to the press the existence, the nature and most of the content of the letter. This we find undermined the application of what would otherwise have been regarded as normal exemptions. We find it is in the public interest to disclose the disputed information due to the exceptional nature of the circumstances of the facts in this case. Because of the unusual circumstances we find the chilling effect has little bearing on this particular case. We are of the view that it will have no effect on ministerial correspondence, which was live at the time because the issues were taken into the public domain when he said more than may have been regarded as advisable through press release and in TV interviews. This in our view takes this case out of the norm. We find his conduct undermines the usual or normally high public interest in protecting sensitive ministerial correspondence on a matter of internal governance and ministerial roles that remained live.
- e) We find the actual content and intent of the letter effectively is in the public domain. While we accept the exact wording is not in the public domain, we do not accept that means the content and intent of it are not. We find they are.
- f) It is not disputed that it is ministerial correspondence and that it is live, as the P.M. had not responded at the time of the request. However, as the Commissioner asserts, because it is live does not mean that it



relates to any Cabinet decision to which the doctrine of collective responsibility could meaningfully apply. It relates to the view of one minister in relation to the appropriate allocation of responsibility for a particular government policy. Nor, as the Commissioner asserts, does the disputed information record any private views of ministers in relation to policy matters, which the doctrine of collective responsibility would protect.

- g) We are persuaded by Lord O'Donnell's helpful evidence that this is a very unusual situation. In our view there is a compelling argument that transparency requires that the full story come out in the interest of all parties and this is a strong element in assessing greater weight to the argument for the public interest in disclosure. We are of the view that the generic arguments that normally have weight in supporting non-disclosure do not apply in the circumstances of this case or carry the usual degree of weight. Politicians are men of the world who generally know where the public interest lies. Robust discussion is the norm, even dissent is commonplace and we accept needs space, but when a personal dispute spills into the public domain it is in the public interest to ensure that the public know and understand what such dispute is about and the effects if any on public policy, and governance if any, relating to the implementation or development of government policy.
- h) At the same time we have noted as Lord O'Donnell properly pointed out "*Just because it is in the public domain does not make it public*". He also said "*It is one thing to make a statement, it is another thing to release its content*". The Appellant argues, and we accept, that protection of Cabinet Collective Responsibility is in the public interest and it should be protected vigorously, but there are occasions where the balance can go the other way. We listened carefully to Lord O'Donnell's evidence but have not been persuaded on the evidence on the facts in this case that the space for free and frank discussion between the P.M. and a Cabinet Minister has been impaired or that disclosure of the letter will affect free and frank discussion in the future. On the contrary, we are of the view that when government ministers voluntarily conduct a discussion, argument or debate in the public forum, it is important that the public are properly informed of the facts, the background and the context. This provides a strong argument in support of disclosure on the grounds of transparency and accountability. In this case the relevant Minister himself made his views known. The Secretary of State has communicated his view to the world at large through discussions with a national newspaper, and summarised parts of the Disputed Information. The public interest in preserving the confidentiality of ministerial communications of the nature contained in the letter is in our view significantly limited in this case. The greater public interest lies in knowing the details of the dispute that was raised in public in circumstances that were unusual and extraordinary in this case.

- i) We also accept the Commissioners contention that disclosure of the disputed information will take place against this exceptional backdrop and will not herald a sea change.

**20]** We find that under either regime (EIR or FOIA), the public interest test favours disclosure on the facts pertaining to this case. In this case the Commissioners determination on the applicable regime does not affect the outcome and the disputed information should be disclosed.

**21]** Accordingly we dismiss the appeal.

**22]** The decision in this case has been unusually delayed and I wish to apologise to the parties for any inconvenience caused. The initial and substantial delay was as a result of the Tribunal awaiting a helpful Upper Tribunal decision on similar issues and the delay over the past few months has been due to circumstances beyond my control.

Brian Kennedy QC  
30 October 2015.

Promulgated 4 November 2015