



Neutral Citation Number:

**IN THE FIRST-TIER TRIBUNAL** **Appeal No: EA/2015/0019**  
**GENERAL REGULATORY CHAMBER**  
**(INFORMATION RIGHTS)**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50532911**  
**Dated: 8 December 2014**

**Appellant:** **Rights and Accountability in Development 'RAID' by its**  
**Executive Director Patricia Feeney**

**Respondent:** **The Information Commissioner**  
**[2nd Respondent:] HM Treasury**

**Heard at: Field House, London**

**Date of Hearing: 29 September 2015, deliberations 21 December 2015**

**Before**

**Chris Hughes**

**Judge**

**and**

**Suzanne Cosgrave and David Wilkinson**

**Tribunal Members**

**Date of Decision: 12 January 2015**

**Attendances:**

For the Appellant: Julianne Kerr Morrison

For the Respondent: Robin Hopkins

For the 2<sup>nd</sup> Respondent: Brian Kennelly

**Subject matter:**

Freedom of Information Act 2000 s 44

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal upholds the decision notice dated 8 December 2014 and dismisses the appeal.

## **REASONS FOR DECISION**

### **Introduction**

1. The second respondent (“HM Treasury”) is responsible for the administration of the various sanctions regimes against individuals and countries which the UK is required, under international law, to enforce. The Appellant in this case (“Ms Feeney”) is the executive director of RAID, a NGO concerned (among other things) with the sanctions regime relating to Zimbabwe.
2. In the course of correspondence in 2011 and 2012 with the Asset Freezing Unit of HM Treasury Ms Feeney asked a number of questions relating to that regime and in particular the enforcement of sanctions against a named individual who was subject to the sanctions regime. The Asset Freezing Unit dealt with these questions within the usual course of its business. On 3 December 2012 it wrote to Ms Feeney explaining “we cannot reply specifically to your queries... However in the interests of being helpful we have provided information about our general approach to implementing financial sanctions in the UK, in so far as it relates to some of the main issues you raised.” (open bundle page 100). On 22 May 2013 Ms Feeney asked for the questions to be treated as requests for information under FOIA.
3. Following further correspondence, by an internal review dated 1 November 2013 HM Treasury wrote confirming its stance that it could not comment on specific cases (open bundle letter pages 103-106, annex detailing the requests pages 107-110). It confirmed that it held information within scope of the requests and responded to three requests “we have identified that three of your requests are seeking our views and can thus be answered theoretically. These are not necessarily regime specific and as such, are not being answered under the Freedom of Information Act 2000 but we wish to be helpful to you where we are able to provide information.”
4. It confirmed that it relied on exemption in s44(1)(b) FOIA in respect of all the information held by reason of Article 8 of Regulation 314/2004. It noted, but disagreed with Ms Feeney’s claim that this “does not amount to a statutory bar for the purposes of section 44 FOIA”. It also set out other exemptions which it considered applied to some of the information: s42(1) legal privilege, 43(2) prejudice to

commercial interests, section 27(1)(b) prejudice to UK relations with the EU and 36(2)(c) prejudice to the effective conduct of public affairs. In respect of these exemptions it considered the balance of public interest and concluded that the information sought should not be disclosed.

5. The Annex set out the text of 30 questions. The 27 which were not answered all sought detailed information on such questions as the involvement of specific parties in transactions and the date of application for licences under the sanctions regime in respect of such transactions.

#### The complaint to the Information Commissioner

6. Ms Feeney complained to the first respondent (“Information Commissioner”) who, on 8 December 2014, issued a decision notice confirming that HM Treasury was entitled to withhold all the information within the scope of Ms Feeney’s request on the basis of the exemption at s44(1)b.

#### The appeal to the Tribunal

7. In the appeal RAID criticised the Information Commissioner’s handling of the appeal in dealing with evidential issues as to the content of the disputed information in a confidential annex. HM Treasury had not dealt with the request with sufficient expedition. The substantive ground of appeal was that Article 8 of EU Regulation 314/2004 did not, as a matter of law amount to a statutory bar on disclosure of information under a national access to information regime such as FOIA. Even if the all the requested information was provided to or received by HM Treasury in accordance with Article 8 “disclosure under FOIA is not a further “use” of that information by the Treasury within the meaning of EU Regulation.”
8. The Information Commissioner resisted the appeal relying on his decision notice. From the evidence submitted to him he had no grounds for considering that the material had not been obtained by the Treasury under Article 8. The reasoning was sufficient for the decision. Any delay in handling the request did not affect the substantive merits. The term “use” was broad and encompassed, and so prohibited, disclosure under FOIA. HM Treasury supported this position.
9. In subsequent pleadings the issues raised by other exemptions and the arguments with respect to section 44 and the interaction with Regulation 314/2004 were

extensively canvassed and the first date for the hearing of this case was vacated for consideration by a Minister and the issuing of a certificate under section 36(2)(b)(ii) and 36(2)(c)

The questions for the Tribunal

10. The three questions for the tribunal were:

- Whether the information requested from HM Treasury had all been obtained under Article 8;
- The proper interpretation of Article 8 of the EU regulation and whether it overrode any duty or power of HM Treasury to disclose the requested information under FOIA,
- If there was any information not obtained under Article 8 or if Article 8 did not preclude disclosure, whether the other exemptions relied upon by HM Treasury prevented disclosure.

Statutory framework

11. Section 44 FOIA provides an exemption to the duty to disclose information which has been requested:-

***“Prohibitions on disclosure.***

*(1)Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—*

*.....*

*(b)is incompatible with any EU obligation, or*

*.....”*

12. The sanctions regime relevant to this case is “Council Regulation (EC) No 314/2004 of 19 February 2004 concerning certain restrictive measures in respect of Zimbabwe”. Since it is an EU regulation it is directly applicable and does not require UK legislation to bring it into force within the UK. The tribunal was informed that this Regulation is in a standard form adopted as each new sanctions regime is brought into force with respect to different countries. In the light of serious human rights abuses in Zimbabwe this regulation imposes obligations on the EU member states to administer

a system of economic sanctions which (recital 4) “*include, inter alia, a ban on technical assistance, financing and financial assistance related to military activities, a ban on the export of equipment which might be used for internal repression, and the freezing of funds, financial assets and economic resources of members of the Government of Zimbabwe and of any natural or legal persons, entities or bodies associated with them*”. HM Treasury is the UK competent authority responsible for the Regulation which it administers through its Sanctions and Counter-Terrorism Financing Unit.

13. A key provision of the Regulation is Article 8(1) which imposes a duty on all persons and organisations, irrespective of any professional confidentiality to “*supply immediately any information which would facilitate compliance with this Regulation*” to the competent authority of the member state where they are located. The normal confidentiality obligations by which banks, lawyers, investment advisers and similar professionals usually conduct their affairs are over-ridden in the interests of upholding the sanctions regime. However the onward transmission of the information is strictly controlled. Article 8(3) provides:-

“*Any information provided or received in accordance with this Article shall be used only for the purposes for which it was provided or received.*”

#### Evidence

14. In his evidence Mr Maydon, Head of the Sanctions and Counter-Terrorism Financing Unit confirmed that HM Treasury received information in accordance with the information sharing provisions of the Regulation. He stated (witness statement 12 May 2015, open bundle page 185 paragraph 7) “*Having –re-reviewed the documents in preparation for the upcoming hearing, HM Treasury considers that in limited respects the documents are not covered in their entirety by article 8 of the EU regulation.*” The documents before the tribunal in the closed bundle comprised several hundred pages of communications with external agencies and internal government communications. Considerable effort was expended by HM Treasury in identifying where in each document other information was contained that might not be covered by the section 44 exemption. The tribunal as satisfied by his evidence and by an analysis of the documents that the answers to the questions asked could be found in documents submitted to HM Treasury in its role as competent authority.

There was no evidence before the tribunal to show that there was any other origin for the information sought.

15. Ms Feeney's evidence argued that very limited and specific information was sought and HM Treasury should not be permitted to apply a blanket exemption to the request given the clear public interest in disclosure.
16. The issue of the adequacy of the Information Commissioner's reasoning and the use of a confidential annex was not pursued before the tribunal.

### Consideration

17. The tribunal was satisfied that HM Treasury had attempted to provide Ms Feeney with all the information it could. However during the course of the handling of the request, the complaint and the subsequent litigation, the focus of both Ms Feeney and HM Treasury has shifted from the actual questions asked to wider issues. Ms Feeney has been strongly focussed on issues as to the specific breaches of the sanctions regime which she fears have occurred and provided the HM Treasury and the tribunal with detailed narratives on these. HM Treasury, as exemplified by the witness statement of Mr Maydon quoted above, shifted its focus from the specific questions asked of it to the documents containing that information. A similar approach was at times adopted by Ms Feeney in arguing for the disclosure of the documents, however during the course of the hearing it was acknowledged that the information requested and therefore the subject of the proceedings was the specific answer to each of the 27 questions set out in Annex A of HM Treasury's letter of 1 November 2013.
18. FOIA gives a qualified right to receive the information specified in the request; it is generally blind as to the specific form of the information provided. In this case Ms Feeney asked for specific information; she did not request copies of documents but answers.
19. The sanctions regime relies on information and is largely impotent without the co-operation of the commercial world in notifying it of matters relevant to the sanctions regime. HM Treasury as the competent authority is concerned to uphold the sanctions regime. Its statutory function is to receive and where appropriate act on information relevant to that regime. The relevant documents in the bundle ie those containing the answers to the questions posed were received by the relevant unit within HM Treasury or generated by it as a result of its sanctions administration activity.

20. HM Treasury has no interest in receiving the information which answers the case specific questions about the enforcement of the Zimbabwe sanctions regime except for the purpose of administering that regime. The tortuous analysis undertaken by HM Treasury of each document containing an answer or a part answer to the specific questions asked was therefore an unfortunate diversion of resources. What was asked for was case information. That was provided to HM Treasury under Article 8(1) and accordingly restricted in its use by Article 8(3). The detailed further analysis was therefore only needed if Article 8(3) does not operate as a complete bar to answering the specific questions asked.
21. The tribunal considered the arguments advanced in favour of Ms Feeney's position were unsatisfactory. The information regime in the Zimbabwe sanctions regulation is not subject to FOIA. Section 44(1) is explicit – information is exempt if its disclosure is in breach of an EU obligation. The words in parenthesis "*otherwise than under this Act*" have the effect of upholding the EU prohibition – not undermining it. The consequence of Ms Feeney's interpretation would be that section 44(1) would be redundant and any information protected from disclosure by a statutory prohibition, an EU obligation or a court order could be disclosed if subject to a FOIA request. The further argument that the Zimbabwe regulation should be read in the light of and subject to UK statute is equally absurd. Regulation 8(3) should be given a purposive interpretation. The sanctions regime over-rides confidentiality, the role of 8(3) is to minimise the harm to that key principle by restricting the use of confidential information to what is necessary for sanctions administration. The word "use" has a broad meaning however the uses to which the information in this case may be put are strictly limited to "*the purposes for which it was provided or received*" – the administration of a sanctions regime; not for putting into the public domain under FOIA.
22. In the light of the tribunal's findings as to the origin of the requested information and the scope of the request, it was not necessary to consider the additional exemptions claimed. The tribunal is satisfied that the Information Commissioner's decision is correct in law and dismisses the appeal.

23. Our decision is unanimous

Judge Chris Hughes

Date: 12 January 2015