



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

Appeal Reference: EA/2015/0277

**Heard at Field House
On 13 April 2016**

Date of Promulgation 6 July 2016

INFORMATION RIGHTS

Before

**JUDGE PETER LANE
DAVE SIVERS
ALISON LOWTON**

Between

THE DEPARTMENT FOR TRANSPORT

Appellant

and

THE INFORMATION COMMISSIONER

First respondent

and

CHRIS HASTINGS

Second respondent

Appearances:-

For the appellant: Mr R Dunlop, Counsel, instructed by the Government Legal Department.

For the First Respondent: Miss Laura Elizabeth John, Counsel, instructed by the Solicitor for the Information Commissioner

The Second Respondent appeared in person

DECISION AND REASONS

Introduction

1. Mr Hastings is a journalist working for the *Mail on Sunday*. He was interested in a meeting which took place on 10 September 2014 between HRH the Prince of Wales and the Right Hon Brandon Lewis, Minister for Housing and Planning at the Department for Communities and Local Government and the Right Hon John Hayes MP, the Minister for Transport.

2. On 1 October 2014 Mr Hastings asked the Department for Transport for the following:-

"1... In the case of this meeting can you please provide copies all correspondence and communications (including emails) between Mr Hayes and his Royal Highness the Prince of Wales which in way (sic) relates to the meeting and the topics under discussion. Please note that the reference to His Royal Highness the Prince of Wales should also include his Private Secretary or his private office. Please note that the reference to the Minister should include his Private Secretary and or his private office. This correspondence and communication could have been generated prior to the meeting taking place or it could have been generated afterwards.

2... In the case of this meeting can you please identify any other representatives and or employees from the department who accompanied Mr Hayes? Can you please identify all other individuals at the meeting irrespective of whether they are connected to the department.

3... In the case of this meeting can the department please provide copies of all documentation, correspondence and communications (including emails) held by the organisation which in any way relates to the meeting and the topics under discussion at the meeting.

4... In the case of this meeting can the department please provide a list of all environmental topics covered at the meeting.

5... Can the department please provide copies of any briefing notes and or similar which were issued to Mr Hayes and or any other departmental staff member or representative prior to the meeting taking place.

6... Can the department please provide copies of any correspondence and communications (including emails) between Mr Hayes and any other departmental employee which in any way relate to the meeting and the specific topics under discussion at those meeting. These communications could have pre-dated the meeting or it could have been generated afterwards."

3. The DfT refused Mr Hastings' request on 29 October 2014. Following review, the DfT stated that it held nothing in relation to requests 1 and 6. It disclosed the name of Brandon Lewis MP in relation to request 2, but withheld the other names, as well as the information in relation to requests 3-5. Relying upon sections 37(1)(a), 40(2) and 41 of the Freedom of Information 2000 (FOIA).

Legislation: the FOIA and EIR regimes

4. As will be explained, our decision concerns only section 37(1)(a) of FOIA. This provision was inserted, with effect from 19 January 2011, by the Constitutional Reform and Governance Act 2010. It provides as follows:-

"37. – Communications with Her Majesty, etc. and honours.

(1) Information is exempt information if it relates to—

...

(aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,"

5. The exemption in section 37(1)(a) is an "absolute" one: section 2(3)(ea) of FOIA. No public interest balancing exercise is, accordingly, required in order to determine whether the exemption applies.

6. The Commissioner's decision notice of 20 October 2015 stated that, in the Commissioner's view, most of the information which the DfT had refused to disclose was environmental information, within the scope of the Environmental Information Regulations 2004. As such, the information was not covered by FOIA and, accordingly, the exemption in section 37(1)(a) did not permit the DfT to withhold the disputed information. Because the EIR give effect to EU Council Directive 2003/4/ec, Parliament could not have amended the EIR to insert a provision equivalent to section 37(1)(aa).

7. Regulation 2 of the EIR defines environmental information as follows:-

" "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 form 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 or 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, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);”

8. Regulation 13 of the EIR provides as follows:-

“ 13.—(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

(2) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene—

(i) any of the data protection principles; or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(1) (which relate to manual data held by public authorities) were disregarded.

(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

(4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that—

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of that Act."

9. The Commissioner accepted that the names of certain meeting attendees could be withheld pursuant to regulation 13. Otherwise, the Commissioner considered that the remaining information was environmental information.

The appeal

10. The DfT appealed to the Tribunal against the Commissioner's decision. Shortly before the hearing on 13 April 2016, the DfT wrote to Mr Hastings to state that it was now department's view that certain of the information was, indeed, environmental and should accordingly be disclosed. The department did not wish to make any public interest arguments in favour of withholding this information. As a result of this development, the Commissioner's stance (as set out in Miss John's skeleton argument) was that the remaining information about the meeting, which the DfT continued to withhold, also fell to be treated as environmental information. In this regard, Miss John relied upon the decision of the information tribunal in Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth (EA/2007/0072).

11. In the DBERR case, the information tribunal was faced with a number of questions, including whether FOIA or EIR was the applicable jurisdiction.

"28. ... we are faced with documents which may contain both environmental and non environmental information. Ms Grey on behalf of BERR argues that we should consider whether the Disputed Information is environmental information on a document by document basis. This would be a very convenient way to approach the matter. However the definition under Regulation 2(1) EIR covers "information", not documents as we understand is the position in other jurisdictions.

29. Under s.39 FOIA information that is covered by the definition of environmental information under EIR is exempt under FOIA and is to be dealt with under the Regulations. It is therefore necessary for us to consider which jurisdiction to apply to the Disputed Information. This is not easy because some documents may contain both environmental and other information. How should we approach such documents? Where a document divides easily into parts where the subject matter of each part is easily identifiable this should enable the document to be considered in parts so as to decide which information is caught by EIR. Where this is not the case do we need to review the document in exacting detail to decide which parts or even paragraphs or sentences

are subject to EIR or FOIA? To do so would be an extremely onerous approach on those needing to apply the law. But our information laws are based on requests for information not documents. We believe Parliament may not have appreciated such a consequence and that where possible would have wanted a pragmatic approach to be taken. Therefore we find that where the predominant purpose of the document covers environmental information then it may be possible to find that the whole document is subject to EIR. Where there are a number of purposes and none of them are dominant then it would appear that the public authority has no choice but to review the contents of the document in detail. In deciding which statute applies the public authority cannot, of course, take into account the fact that one piece of legislation may be more favourable to it than another. There is no suggestion that this has happened in this case.

...

How should the Tribunal deal with documents covering many subjects under FOIA

33. Most of the Disputed Information is comprised of documents covering many subjects. This is largely because the documents comprise notes of meetings which covered a wide range of subjects. This has resulted in the Commissioner reviewing the Documents in some detail and making decisions sometimes in relation to paragraphs and even sentences. As already observed this is an extremely onerous process and clearly raises concerns for dealing with such requests.

34. This was not the original approach of BERR who seemed to have claimed exemption(s) per document. However during the investigation of the complaint both BERR and the Commissioner seem to have resorted to a much more detailed analysis partially arising out BERR's original disclosure of heavily redacted documents.

35. Was the Commissioner right to take this approach? As with environmental information, public authorities are required to deal with requests under s.1(1) FOIA for 'information'. Information is defined under s.84 as 'information recorded in any form.' There is no reference to 'documents'. We therefore find that the Commissioner's approach is correct, despite the onerous implications.

36. In deciding this case we have therefore had to undertake a detailed examination of all the Disputed Information and have appreciated at first hand the size of the task. However we would observe that we infrequently have to take this approach to documents, largely because most documents tend to be based on a single issue or predominantly one subject matter where exemptions are able to be properly claimed in relation to the whole document.

37. One of the problems arising with the Commissioner's approach in this case is whether it could lead to public authorities bringing the s.12 FOIA (cost of compliance exceeds the appropriate limit) exception into play. BERR has not raised the issue of costs in this appeal and we heard no submissions on it; therefore the Tribunal does not need to decide whether the time involved can be claimed under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. However we would comment, although not necessary to decide in this case, that the time taken to redact documents is not in our view caught by the 2004 Regulations and should not be taken into account when calculating the appropriate limit and that the Tribunal's decision in *Jenkins v Information Commissioner EA/2006/0067* should not be interpreted in any other way."

12. Having seen the way the Commissioner's case was put by Miss John, Mr Dunlop, on behalf of the DfT, submitted that the Tribunal should act consistently with the overriding objective in rule 2 by considering the parties' submissions on the preliminary issue of which regime should be applied to the (relatively small) amounts of information which was still in dispute; namely the EIR or FOIA. In the event that the Tribunal decided that the FOIA regime applied, the appeal would necessarily have to be allowed since the information was exempt by reason of section 37(1)(a) of FOIA. If the Tribunal decided that the EIR was the relevant regime, then the Tribunal would hear evidence and submissions regarding the public interest balancing exercise.

13. The Tribunal concluded that it would be appropriate to decide the issue of the relevant regime as a preliminary issue. We accordingly heard open submissions from the parties and closed submissions from Mr Dunlop and Miss John.

14. Counsel agreed the following gist of the closed session, which the Tribunal approved:-

" 1. Counsel made submissions on the characterisation of the subject-matter of the disputed information and whether it was severable from the remainder.

Mr Dunlop submitted that it should be characterised as "administrative".

Miss John repeated a submission made in open that it had the same subject-matter as the meeting itself.

2. The Chair asked Miss John whether it was relevant to the question of which regime is applicable that the information would be subject to an absolute exemption if it is dealt with under FOIA.

Miss John submitted that it is not, because the question of which regime is applicable is logically prior to the question of which exemption/exemptions apply.

Mr Dunlop repeated the submission made in open that it is relevant to ask whether parliament would have wanted information that is not environmental to be disclosed on the basis that it is 'wrapped up' with other information that was environmental.

3. Certain parts of the disputed information in document 2 were discussed.
The DfT has confirmed that it is content now to disclose some of that information."

Submissions

15. Miss John relied upon paragraph 29 of DBERR. She submitted that the following principles could be extracted from it. It will be a question of fact for the Commissioner/Tribunal as to whether it is possible in any individual case clearly to identify a set of information that "divides easily" from the remainder and that has an "easily identifiable subject matter", on the basis of which one may determine which regime applies. If, however, it is not possible to clearly sever information in this way then the "predominant purpose" test described by the Information Tribunal should be applied. Neither the Commissioner nor the Tribunal, according to Miss John, are required to dissect individual documents on a paragraph-by-paragraph or sentence-by-sentence basis and to apply a different regime to each.

16. Miss John argued that, in the present case, contrary to DfT's contention the remaining disputed information cannot be severed from the remainder. The information has no "clearly identifiable subject". Rather, it is by its nature and context linked to the meeting which was the subject of Mr Hastings' request and to the topics discussed at that meeting, which the DfT accepts are environmental information. In these circumstances, the "predominant purpose" test identified in DBERR should be applied. The outcome of that test is that the entirety of the information is within the EIR regime.

17. Mr Dunlop's submission focussed on the fact that, as emerges from paragraphs 33 to 35 of DBERR, when the Information Tribunal came to apply the principles articulated in paragraph 30 it went well beyond the "document by document" approach, holding that a reviewing exercise that involved "making decisions sometimes in relation to paragraphs and even sentences" was "correct, despite the onerous implications".

18. Mr Dunlop made the powerful point that, contrary to the Commissioner's intention that the disputed information could not be severed from the remainder, this is precisely what the DfT had done. As could be seen, the severance had not had the effect of making the disclosable information unintelligible. On the contrary, the disclosures "make perfect sense even with the disputed information removed". To reject a paragraph-by-paragraph and line-by-line approach in the present case would, Mr Dunlop submitted, undermine the will of Parliament which, in enacting section 37(1)(aa) of FOIA, plainly given communications between public authorities and the heir to the throne the maximum possible protection against disclosure.

19. Mr Hastings told us that he was grateful for the information that had now been disclosed but he considered that without what he described as the context, it was not

of much use. In his view, the Prince of Wales is subject to the EIR given that the Prince is interested in the environment and the meeting was to discuss environmental issues.

Discussion

20. We share the Commissioner's concern, as described by Miss John, that it may often be highly problematic for the Commissioner or the Tribunal to have to undertake its own "hypothetical redaction" or "blue pencil" exercise, in order to determine whether the result supports the public authority's contention that certain information within a document or documents is exempt because it falls under the FOIA regime (with its exceptions), rather than under that of the EIR. As Mr Dunlop in effect acknowledged in oral argument, the solution to that potential problem lies in requiring the public authority to make good its case, by undertaking the relevant work and presenting the result to the Commissioner or Tribunal. The Tribunal finds that the correct approach is, accordingly as follows.

(1) If a public authority contends that information associated with environmental information is exempt from disclosure by reason of FOIA, the authority has to identify what the allegedly exempt information is.

(2) Where the authority does so, the Commissioner/Tribunal will decide if the environmental information is coherent/comprehensible without the other information. As Miss John submits, that would be a question of fact, to be determined in each particular case.

(3) If the Commissioner/Tribunal concludes that the environmental information is not coherent/comprehensible, then both sets of information must be disclosed as environmental information subject to the EIR regime **unless the predominant purpose of the entire information is not environmental.**

(4) The application of the "predominant purpose" test serves, amongst other things, to avoid the "tail wagging the dog", in that the presence of a small amount of environmental information within an overall set of information that is non-environmental will not cause the entire set to be disclosed in the face of a FOIA exemption, which is not present in the EIR.

21. We have earlier recorded that the DfT accepted, in the course of the hearing, that certain words within otherwise now disclosed passages should, in fact, be disclosed. The words in question are, in each case, "lines to take". We are fully satisfied that the remaining disputed material (marked in green in the closed bundle) is not environmental information and that its severance from the disclosed environmental information does not render the latter incoherent or unintelligible. Whilst we accept that the disclosure of both sets of information might render the whole more interesting from a journalistic perspective, the disclosed information makes perfect

sense on its own. As is plain, it is briefing material in connection with the meeting between Ministers and the Prince of Wales. We are entirely satisfied that the withheld material is not, in its own terms, environmental information within the meaning of regulation 2 of the EIR. The disclosed material, by contrast, is about the government's activities in the environmental field, as well as the Prince's project in Poundbury, Dorset. Further details about the withheld information are contained in the Closed Annex to this decision.

22. Having deliberated on 13 April, we announced at the hearing that we had determined the preliminary issue in favour of the DfT and that the appeal would, accordingly, be allowed.

23. We accordingly found that the Commissioner's notice of decision is not in accordance with the law, to the extent that it required disclosure of the material highlighted in green in the closed bundle.

24. Our decision is unanimous.

Judge Peter Lane
Date: 30 June 2016