FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information rights

Appeal Number: EA/2017/0093

Heard at Field House
On 8 September 2017

Before

JUDGE PETER LANE
ALISON LOWTON
NIGEL WATSON

Between

GABRIEL WEBBER

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE CABINET OFFICE

Second Respondent

Representation:

For the Appellant: In Person
For the First Respondent: No appearance or representation

For the Second Respondent: Mr Robin Hopkins, Counsel, instructed by the Government Legal Department

DECISION AND REASONS

Introduction

1. This appeal concerns the grant of a Public Duties Cost Allowance (PDCA) for Mr Nick Clegg, who was Deputy Prime Minister in the Coalition Government from 2010 to 2015. On 12 July 2016, the appellant made the following request to the Cabinet Office:-

> "I see from your latest accounts that the PDCA is now available to Nick Clegg. Please provide me with an electronic copy of all recorded information you hold regarding Nick Clegg's eligibility for this allowance, except (i) details of his claims, and (ii) the total amount he has claimed.
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> This will no doubt include information on how he came to be eligible, who proposed this, his response, and so on".

2. The Information Commissioner subsequently found that the Cabinet Office contravened its obligation under section 10 of Freedom of Information Act 2000 (time for compliance), by failing to provide a response to the appellant within a reasonable time. The Information Commissioner decided, however, that the Cabinet Office had been entitled to refuse to disclose the information, on the basis that the information fell within the scope of section 35 (1)(a) of FOIA and that the public interest in withholding the information outweighed the public interest in its disclosure. The appellant appealed against that decision.

3. Section 35(1)(a) provides as follows:

> "35(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to –
>
> (a) the formulation or development of government policy."

4. The Cabinet Office's initial refusal was communicated to the appellant on 22 September 2016. A decision on internal review, which upheld the earlier decision, was communicated to the appellant on 20 October 2016.

5. On 9 September 2016, the following information was published, by way of a written parliamentary question and answer:-

> "Question: to ask the Minister for the Cabinet Office, what arrangements have been made for the process of approval of expenses claims submitted by the right hon. Member for Sheffield, Hallam under the Public Duties Cost Allowance"
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> Answer: the purpose of the Public Duties Cost Allowance is to assist former Prime Ministers with the costs of continuing to fulfil duties associated with their previous position in public life. Exceptionally, the then Prime Minister agreed that the former Deputy Prime Minister, the Rt.Hon. Member for Sheffield Hallam, should be able to have access to the allowance to recognise the special position he held in the Coalition Government. Other former Deputy Prime Ministers are not eligible for the allowance. The allowance is set at a maximum limit of £115,000 per annum. The amounts paid are a reimbursement of expenses, accounted for in the published Cabinet Office Annual Reports and Accounts. The former Deputy Prime Minister is eligible for the allowance from the date of leaving ministerial office for the duration of this Parliament."

Scope

6. The appellant informed the Cabinet Office that his request was confined to information about Mr Clegg's eligibility for the PDCA, not details of Mr Clegg's actual claims. Partly as a result of this, the Cabinet Office contended that certain elements of the withheld information are outside the scope of the appellant's request.

7. Having examined the information, the Tribunal agrees with the Cabinet Office on this issue of scope. Our reasoning is given in the closed annex to this decision.

The submissions

8. So far as concerns the information which is within the scope of the appellant's request, the Cabinet Office's position, as articulated by Mr Hopkins both in writing and at the hearing, is that the balance of the public interest lies in withholding the information. Mr Hopkins contends that the disputed information comprises discussions of policy options, ideas and suggestions. There are also exchanges of views about how the policy area could be approached, both in respect to Mr Clegg and more broadly. Open discussions of policy options are said to be "evident on every page. This point is pivotal to this appeal".

9. According to Mr Hopkins, the disputed information is also replete with "genuinely free and frank discussions about this issue. This includes frank commentary…. as well as genuinely open discussions of policy options (evident throughout the disputed information)."

10. Mr Hopkins submitted that, at the time of the appellant's request, government policy about the PDCA remained in a state of development. Referring to the witness evidence of Ms Sharon Carter of the Cabinet Office (to which we shall return in due course), Mr Hopkins submitted that the PDCA remains in a state

of development and that, although decisions have been made about the granting of the PDCA to Mr Clegg, the broad policy question of how the PDCA should operate in the future, remains a live one, and was such at all material times. Policy on how the PDCA should operate remains in a state of formulation.

11. In this regard, Mr Hopkins relied on OGC v IC and the Attorney General [2008] EWHC 744(Admin), where at [100], we find the following:-

> "… disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances, to considerable time and space, to hammer out policy by exploring safe and radical options alike without the threat of lurid headlines depicting that which has been merely broached as agreed policy".

12. The public interest in withholding the information is, therefore, very high, in Mr Hopkins' submission.

13. Mr Hopkins submitted that the appellant's attempt to portray the public interest in favour of disclosure as outweighing the factors Mr Hopkins had described, was flawed. The appellant had been unable to produce anything to show that there had been significant public interest in the issue of Mr Clegg and the PDCA.

14. Mr Hopkins said that the Cabinet Office had, in fact, already made public a good deal of information as to how Mr Clegg came to be granted the PDCA. In addition to the Parliamentary Question and Answer referred to above, a slightly later Q&A (12 September 2016) had given further details about the PDCA. Furthermore, the Cabinet Office had provided the appellant with the following:-

> "The Deputy Prime Minister requested the allowance for a limited period, reflecting the unique nature of the role he held in the Coalition Government. The then Prime Minister agreed. Mr Clegg is eligible for the allowance from the date of leaving ministerial office for the duration of this Parliament".

15. Thus, according to Mr Hopkins, revealing the disputed information "would make little or no incremental contribution" to public debate of Mr Clegg and the PDCA.

16. The appellant took issue with the Cabinet Office's reasons (in effect, adopted by the Information Commissioner) for concluding that the balance of the public interest lay in favour of withholding the information. In the context of the present case, the appellant considered that use of the expressions "detriment" and "chilling effects" was vague, intangible and insufficiently precise to meet the threshold set by Department of Health v Lewis [2015] UKUT 0159 (AAC). The appellant laid emphasis on the Civil Service Code, whereby civil servants

"must provide information and advice, including advice to ministers, on the basis of the evidence, and accurately present the options and facts… you must not ignore inconvenient facts or relevant considerations when providing advice and making decisions". Given that it is, accordingly, every civil servant's professional duty to provide proper advice to Ministers, they must be, according to the appellant, "robust enough to continue providing such advice whatever the consequences of this particular disclosure".

17. The appellant submitted that the history of the PDCA, was, in effect, problematic. It had been introduced in 1991, by the then Prime Minister, without parliamentary involvement. It was only when the appellant studied the accounts released by the Cabinet Office that it became apparent the PDCA had been extended to include Mr Clegg. Whether or not disclosure of the information would be likely to reveal reprehensible conduct, the appellant submitted that there was a strong public interest in shining a light into this area. In his words, "handouts to ex-politicians" should receive proper public scrutiny. "Sunlight" the appellant said, "is the best disinfectant".

Witness evidence

18. We heard evidence from Ms Sharon Carter. She is currently employed in the Cabinet Office as Head of the Propriety and Ethics Team, in which capacity she is responsible for advising Departments and others on the application of the Civil Service Code, the Ministerial Code, and the Special Advisor Code of Conduct, as well as a range of related policy issues.

19. Ms Carter confirmed that the PDCA had been introduced in 1991. The total allowance which could be claimed by each former Prime Minister was linked to the ceiling of the centralised arrangements for payment of staff and secretarial support for MPs with London constituencies. The allowance exists to reimburse former Prime Ministers for the expenses they incur in continuing to fulfil public duties. Such expenses might include the cost associated with overseas visits, for example, for the funeral for a former leader, public appearances associated with their former role, for example, at the Cenotaph ceremony, or the costs of running an office (given that the former Prime Ministers continue to receive significant levels of correspondence stemming directly from their time in that office). Payments are made only to meet the actual costs of continuing to fulfil public duties.

20. Ms Carter said that, in addition to the allowance paid, former Prime Ministers are entitled to claim a pension allowance to contribute towards their staff pension costs. This pension allowance is limited to a maximum of ten per cent of staff salary costs.

21. The amounts claimed by former Prime Ministers are published annually in the Cabinet Office annual reports and accounts. The Cabinet Office has also placed copy of the guidance for the payment of the PDCA in the libraries of both the House of Commons and the House of Lords.

22. As far as Mr Clegg is concerned, Ms Carter said:

> "7. In 2015, following the general election, the allowance was extended for a period of five years to Nick Clegg , the former Deputy Prime Minister in the Coalition Government, to help with some of the essential costs and secretariat support associated with being in such a senior position in public life. As PDCA had only been payable since 1991, there had been no previous coalition governments, and no comparable predecessors to Mr Clegg".

23. Having dealt with issues of this scope of the request, (as to which, see above) and personal data such as contact details, Ms Carter said that the remainder of the request and information fell within the exemption in section 35(1)(a). Her reasoning was as follows:-

> "13 …It concerns the development of policy in the area of PDCA and eligibility for PDCA, which was in progress at the time the information was created, and was ongoing at the time of the request. It is clear from the nature and content of the withheld information that this policy issue was in a state of development. I can also confirm that policy on PDCA remains actively under review at the time of this witness statement.
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> 14. The role of Deputy Prime Minister from 2010 to 2015 was unique. Since the inception of PDCA in 1991, there have been no other coalition governments and no other Deputy Prime Ministers who are also the leaders of the junior party in a coalition government. The nearest corollary in British political history would be Clement Atlee in the wartime Coalition Government, who was Deputy Prime Minister and also leader of the junior party in the coalition. In his role as Deputy Prime Minister, Mr Clegg supported the Prime Minister in the oversight of the full range of government policy and initiatives.
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> 15. The consideration and extension of PDCA to Mr Clegg recognised this unique position and the ongoing costs associated with his former responsibilities. As would be expected, there was some discussion about how and in what terms this extension should be granted, and the information and scope of the request sets out very clearly the policy development process in this area.
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> 16. The release of this information relating to policy development in this area would have a detrimental effect on the ability of the Prime Minister and senior officials to have a free and frank discussion and exchange of views about the eligibility of individuals for, and the extent of PDCA. There must be a space within which officials are able to discuss their views on the emerging policy options freely and frankly so as to provide the Prime Minister with the most effective and comprehensive advice. Government Ministers, including the Prime Minister, are rightly answerable for the decisions they take, not for the options

they consider or the other influences on the policy formulation process. The disclosure of information about these considerations and discussions would invite judgments about the content of those considerations, the options considered, the opinions held by different officials, and would introduce a premature scrutiny of the policy options considered in this process. Ultimately, this would be corrosive of parliamentary democracy since it would hold ministers and their advisors accountable for the discussion rather than the decision.

17. I recognise that there is a general public interest in openness of government and acknowledge that transparency may contribute to greater public understanding of and participation in public affairs. I also understand that there is a public interest in understanding how the government develops policies, including those in relation to areas such as the payment of PDCA. I also recognise the specific public interest in understanding how decisions on allowances payable to public figures are made. When considering the balance of the public interest in this case, I take into account the timing of the request, which was just over a year after the creation of the information and scope of the request, and while policy development in this area was still ongoing.

18. Good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure. There is of course a place for public participation in the policy making process, and for public debate of policy options. However, it is not in the best interests of policy formulation, and therefore not in the public interest, that every stage of the policy making process should be made accountable via exposure to public scrutiny.

19. The candour which is evident in the e-mail chains demonstrates the frank and open discussion of the various policy options in this case. Releasing this information would damage the safe space necessary for the most effective development of policy. Officials and minister should be able to consider and advise on all options without considering whether those discussions, rather than the final decision, are held accountable.

20. The Government recognised the interest in this extension of PDCA, and was aware of the need to account for this novel payment. That is why the payment of the allowance was published, with a note, in the Cabinet Office annual report and accounts."

24. Cross-examined by the appellant, Ms Carter said that disclosure at the time when a policy process was live would discourage discourse amongst officials and ministers; it would inhibit a proper exchange of views. Disclosure of discussions relating to emerging policy could "skew" subsequent discussions on the matter.

25. Ms Carter confirmed that she and her fellow civil servants would comply with the Civil Service Code, regardless of the decision that the Tribunal might take. Disclosure, however, might "unconsciously affect the thinking" of officials.

26. In re-examination by Mr Hopkins, Ms Carter said that, until 2015, details of the PDCA and its recipients were made available only through Parliamentary Questions, if any. In 2015, the Cabinet Office began to publish information in its accounts. Ms Carter considered that there had been very limited public interest in the PDCA and little interest in the matter relating to Mr Clegg. The press reports set out at pages 63 and 68 of the bundle were the only ones on the issue of Mr Clegg, so far as she was aware. In an answer to a question from the Tribunal, Ms Carter said that it would be difficult to disentangle the information relating to the decision to award the PDCA to Mr Clegg from wider policy discussions. In any event, the basis upon which Mr Clegg received the award would be relevant to future decisions.

Closed session

27. The Tribunal then went into closed session. Ms Carter explained how the policy on the future operation of the PDCA was actively being worked on and considered in July 2016. She referred to a draft policy paper, prepared in that month. The Tribunal asked to inspect that paper. The Cabinet Office complied. That document was made subject to a rule 14 direction that it be considered on a closed basis only.

28. Ms Carter and Mr Hopkins then took the Tribunal through the withheld information. They highlighted the information that they said comprised frank and candid exchanges of views and the information that discussed policy considerations that were already being worked on, including in July 2016.

Discussion

29. The Tribunal agrees with the Cabinet Office and the Information Commissioner that, depending on the circumstances, disclosing information about government policies that are still being formulated is likely to result in damage to the public administration of affairs. We accept what Ms Carter had to say on this issue, as well as Mr Hopkins' submissions thereon. The fact that civil servants are required by their Code to provide full and frank advice to Ministers is, with respect to the appellant, not an answer to this point. Public officials may well change their behaviour, in unconscious ways, or else adopt forms of discourse, which are "safer" but less efficient, particularly in times of rapid interplay of ideas.

30. This is the case with the e-mail chains, referred to in paragraph 19 of Ms Carter's witness statement (see above). Notwithstanding what we say below, the release of these e-mails, comprising initial exchanges between officials at the beginning

of the policy process, would, we find, inflict harm on the very interests which is it is the purpose of section 35(1)(a) to protect. Conversely, given what is in the public domain and what we are about to say, releasing the emails would add little or nothing of actual significance to public debate on the extension of the PDCA to Mr Clegg.

31. Mr Hopkins submitted that it was, in practice, not possible to sever the relevant information relating to Mr Clegg from the totality of the disclosed information. With some exceptions, however, as identified in the Closed Annex, we consider that the other material within the scope of the request can be severed from the wider issue of the PDCA itself and whether, and if so, how, it should continue to operate.

32. We turn to the issue of whether this severable material ought to be withheld because it concerns government policy, which is still being worked upon.

33. An analogy may be helpful at this point. It is obvious that the Government will always keep under review the issue of taxation. The fact that Value Added Tax, for example, may change from time to time, both as to its rates and exemptions, cannot, in the Tribunal's view, be used to invoke section 35(1)(a), so as to withhold information about a particular policy decision in the VAT field, such as a change in rate, which has already crystallised.

34. By the same token, the fact that policy on the PDCA as a whole was being considered at or around the time of the refusal to disclose the requested information to the appellant, is not a valid reason for refusing to comply with the appellant's request, concerning Mr Clegg.

35. The appellant wanted to know how it was that Mr Clegg was brought within the terms of the PDCA. Plainly, by the time of the refusal the policy decision to include him had been taken.

36. Ms Carter contended that, in the future, issues would be likely to arise as to whether other deputy Prime Ministers or other figures should receive the PDCA. As a result, she suggested that the policy that had led to the decision to pay Mr Clegg the allowance was to be regarded as still in a state of development.

37. We respectfully disagree. The decision to include Mr Clegg is as historical as the decision to pay the allowance to previous Prime Ministers. The fact that it may serve as a precedent, in the light of which other, future decisions may be made, is nothing to the point.

38. Accordingly, we find that the public interest in favour of withholding the material, which is severable and is not the email material mentioned in paragraph 32 above, is much weaker than the Cabinet Office contend. It relates

to a separate policy decision, to pay Mr Clegg the PDCA for a limited period of time, which had been taken before the appellant made his request.

39. We next consider the issue of the public interest in favour of disclosure. We have taken account of the Cabinet Office's submission that a significant amount of information relating to the decision to pay Mr Clegg the allowance is in the public domain. We also note the limited nature of the press coverage, following the appellant's discovery of the announcement relating to Mr Clegg in the Cabinet Office's accounts.

40. We agree with the appellant that there is, nevertheless, a significant public interest in shedding light on the formulation of the policy that resulted in the decision to pay Mr Clegg the allowance. As the appellant says, the PDCA emerged in 1991 as a result of a prime ministerial decision, lacking any parliamentary involvement. There is clearly a strong public interest in knowing why decisions are taken to pay significant sums of public money to fund the activities of former Prime Ministers. The decision to extend the PDCA to include a Deputy Prime Minister is subject to at least the same degree of legitimate interest, if not more.

41. We agree with the appellant that this public interest is not materially diminished, if the withheld material were to reveal nothing problematic in terms of official and ministerial decision making. On the contrary, one of the purposes of FOIA is to encourage good decision-making in official circles and thereby to increase public confidence in decisions taken on its behalf.

Decision

42. We have decided to allow the appeal to the following extent. **The information specified in the Closed Annex as required to be disclosed shall be disclosed by the Cabinet Office, not later than 42 days from the date of this decision.**

43. The information to be disclosed concerns the crystallised policy to pay Mr Clegg the allowance. It does not include information that, upon analysis, is about the policy concerning the entire PDCA system. That policy remains under review and has not crystallised. The public interest in withholding information concerning it is stronger than the public interest in its disclosure.

44. The information to be disclosed also does not include the e-mail exchanges, referred to at paragraph 30 above, comprising initial thoughts and comments of officials. Insofar as they may be said to be within scope, the public interest in their disclosure is significantly outweighed by the public interest in enabling officials to have private space to converse freely, in seeking to ascertain what they are being asked or required to do.

45. The Closed Annex explains these matters in more detail, as well as why certain information in the Closed Bundle is outside the scope of the request and/or concerns personal details, such as officials' e-mail addresses.

Lane J

22 November 2017