First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0076

Heard at Field House on 9 October 2018

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Dr Henry Fitzhugh
and
Ms Anne Chafer

Between

London Unemployed Strategies

Appellant

And

The Information Commissioner

1st Respondent

And

The Department of Work and Pensions

2nd Respondent

The Appellant was represented by Mr Ben Lotz

The Information Commissioner was not represented

DWP was represented by Mr Jonathan Dixey

DECISION AND REASONS

INTRODUCTION

1. This is an appeal against the Commissioner's decision notice FS50652861, dated 19 March 2018.

2. On 1 August 2016, the Appellant wrote to the Department for Work and Pensions (DWP) to ask for information in the following terms (reproduced exactly):-

   1) All email-addresses with job titles for all directors of the DWP, and
   2) All email-addresses for all ministers at the DWP that the DWP is aware of?
   3) And if this is still within the cost limit, can you please provide their locations and addresses of their workplaces?

3. The DWP first relied upon s21 FOIA (information already reasonably accessible) to direct the Appellant to two websites where it said the information could be found. The Appellant complained that the information was out of date and the email addresses that were available were 'generic' rather than 'personal' work email addresses. Following a request for a review, the DWP provided the Appellant with some further, up to date, email addresses, and explained why generic email addresses had been provided.

4. The Appellant then complained to the Commissioner on 28 October 2016. In particular he was aggrieved that the personal email details of Regional Directors and of Ministers had not been provided.

5. The Commissioner records that during the investigation of the complaint the DWP indicated that it intended to rely on s36(2(c) FOIA and s40(2) FOIA, and not s21 FOIA.

SECTION 36 FOIA

6. It is appropriate at this stage to set out the relevant parts of section 36 of FOIA, associated provisions and recent case law which explains how the application of s36(2)(c) FOIA should be considered by the Commissioner and the Tribunal. Section 40(2) FOIA, also relied on by the DWP, will be discussed later in this judgment. Section 36 reads materially in this case: -

> **36.— Prejudice to effective conduct of public affairs.**
> (1) This section applies to—
> (a) information which is held by a government department… and is not exempt information by virtue of section 35, and
> (b) …
> (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
> (a) …
> (b) …
> (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
>
> (3) …
> (4) …
> (5) In subsections (2) and (3) "qualified person"--
>
> (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown
>
> …
>
> (6) Any authorisation for the purposes of this section--
>
> (a) may relate to a specified person or to persons falling within a specified class,
>
> (b) may be general or limited to particular classes of case, and
>
> (c) may be granted subject to conditions.
>
> …

7. The relevant part of section 36 FOIA is not one of the exemptions excluded from the 'public interest' test, and therefore, by section 2 FOIA:-

(1) ...
(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) [the right to have information communicated] does not apply if or to the extent that—
(a) …
(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

8. The correct approach to a case where the s36(2) FOIA exemption is invoked following the opinion of a Qualifying Person (QP), is explained in the recent Upper Tribunal (UT) case of *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) (*Malnick)*. At paragraphs 28 and 29 of the UT's judgment is this:-

> 28. The starting point must be that the proper approach to deciding whether the QP's opinion is reasonable is informed by the nature of the exercise to be performed by the QP and the structure of section 36.
>
> 29. In particular, it is clear that Parliament has chosen to confer responsibility on the QP for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect. As Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55):
>
> > "It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates."

9. The UT then continued to describe the two stages involved in deciding whether information is exempt under s36 FOIA at paragraph 31:-

> 31...first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition ("prejudice") would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

10. The UT then emphasis that the 'QP is not called on to consider the public interest for and against disclosure…the QP is only concerned with the occurrence or likely occurrence of prejudice' (paragraph 32). Going on, the UT explains:-

> 32…The threshold question under section 36(2) does not require the Information Commissioner or the FTT to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal).
>
> 33. Given the clear structural separation of the two stages, it would be an error for a tribunal to consider matters of public interest at the threshold stage.

11. The UT also decided that when considering whether the QP's opinion was reasonable 'we conclude that "reasonable" in section 36(2) FOIA means substantively reasonable and not procedurally reasonable' (paragraph 57).

DECISION MAKING PROCESS

12. In this case the QP was the minister Baroness Buscombe. Baroness Buscombe was provided with information by the DWP in a letter dated 31 July 2017 from the Deputy Director HR Services, which told her that although email addresses for the offices of ministers and directors had been made available to the Appellant, the personal (work) emails had not been disclosed. The information explained that there were appropriate communication routes already available for those who needed to contact the DWP, including to

make complaints, and the disclosure of personal work emails of ministers and directors was likely to lead to clogging up the internal email system, confusion of the correct routes for DWP to assist when dealing with the public, and the risk of electronic disruption, as well as threats through malware and spam. It was explained that directors were not in a position to deal with individual cases and complaints. The advice went on to consider the public interest in disclosing or withholding the information, although it can be seen from the analysis in *Malnick* that this was not strictly a question for the QP. On 1 August 2017, Baroness Buscombe gave her opinion that s36 FOIA 'is fully satisfied in this case'. The Commissioner's decision notice found that the opinion was a reasonable one, having regard to the submissions made to the QP, and therefore the exemption in s36(2)(c) was applicable.

13. The Commissioner thus considered the public interest test as the exemption under s36(2)(c) FOIA is a qualified exemption. The Commissioner considered the following factors:-

(a) The need to give weight to the QP's opinion when considering the public interest balance.

(b) The public interest in increased transparency and accountability of public officials; and the public interest in increased access to ministers and directors of the DWP.

(c) The fact that the DWP already provides and publishes all the contact details service users need to access the DWP services, including routes for complaints.

(d) Disclosure of individual email addresses risks inappropriate contact (including abuse and harassment) with directors and ministers who do not deal individually with service users' cases.

(e) Email addresses for directors' offices and correspondence teams have already been provided.

14. The Commissioner did not specifically state what weight she was giving to the QP's opinion in considering the public interest balance, but in any event concluded that the public interest balance was in favour of withholding the information.

THE APPEAL AND RESPONSE

15. The Appellant appealed this decision on 13 April 2018. The Appellant was concerned that circumstance in which the opinion of the QP was obtained 'was murky at best', and it was not accepted that the exemption in s36(2)(c) FOIA was engaged. The Appellant thought that the Commissioner had struck the public interest balance wrongly, and was aggrieved that the Commissioner had obtained the DWP's views on the public interest test, but not the views of the Appellant. It was also argued that if email addresses were withheld then point 3 of the original request 'does of course become more relevant and some of that is still outstanding'.

16. The Response of the Commissioner to the appeal highlighted the following:-

(a) The appeal does not provide any reason for considering that the QP's opinion (that disclosure would prejudice, or would likely to prejudice, the effective conduct of public affairs) was unreasonable.
(b) The Commissioner had determined the public interest balance correctly and the Appellant had not indicated why it was argued this was not the case.
(c) In relation to the Appellant's case that point 3 in his request had not been dealt with, the Commissioner said that, if this was still an issue (as some

correspondence addresses had been disclosed on 21 September 2016), the DWP could provide submissions in the appeal.

17. The DWP's response to the appeal repeats much of what the Commissioner has set out. The DWP states that it has provided the Appellant with the relevant individuals' correspondence addresses and so has complied with point 3 of the request. The DWP has interpreted the request as relating to directors and directors-general (described as SCS2 and SCS3 level). The DWP noted that the Appellant had complained about the lateness of the reliance on s36(2)(c) FOIA, but also noted that DWP could rely on s36 FOIA and the opinion of the QP at any point in the process.

18. Although this case was listed for paper consideration, a short hearing was held at which Mr Dixey on behalf of the DWP and Mr Lotz on behalf of the Appellant addressed us on issues already raised in the written submissions.

THE TRIBUNAL'S CONSIDERATION

Application of s32(2)(c) FOIA

19. The general approach of the DWP and the QP was that the conduct of public affairs would be likely to be prejudiced, if personal work emails of directors and ministers were disclosed. The DWP has disclosed the generic email details, names and workplace addresses of the individuals concerned, and so members of the public are able to contact the office and correspondence teams of those people. The concern is that disclosure of personal work email addresses would lead to many emails being sent to senior individuals in the DWP and an inordinate amount of time would need to be spent ensuring that emails were properly redirected, as ministers and directors do not deal with individual claims and queries. In addition, the disclosure of personal email addresses would lead to an increased risk that 'hacking' or other

electronic disruption would occur. The briefing to that extent to the QP was provided by an appropriately qualified officer in the DWP as indicated above.

20. It seems to us that it was reasonable for the QP to offer an opinion that disclosure of personal email addresses of directors or ministers 'would prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs'. The DWP has identified generic office email addresses. Although the Appellant thinks that the public should be entitled to have these personal email addresses as well, the only real outcome if these were disclosed would be the risk of disruption and inappropriately sent emails from the public. It might well mean that emails are simply not dealt with in the way they should be, if confusion is caused by an inordinate number of emails being received by directors and ministers.

21. The Appellant has not provided any substantive reasons why the QP's opinion is unreasonable. It is not ideal, of course, that s36(2)(c) FOIA was not relied upon until after the Commissioner had begun her investigation, but if it is, in fact, the correct exemption to apply, then the DWP is entitled to have the Commissioner make a decision on it.

22. For the reasons set out in the briefing to the QP, we would find that the QP's opinion was reasonable, and therefore the s36(2)(c) FOIA exemption applies.

Public interest

23. As that is the case, we must move on to consider the arguments for and against disclosure in the public interest. In doing so we must give the QP's opinion on prejudice appropriate consideration.

24. The Appellant makes the point that, when the DWP decided to rely on s36(2)(c) FOIA during the Commissioner's investigation of the Appellant's complaint, the Commissioner recorded the DWP's arguments on the public

interest test, without seeking the Appellant's views. Although the Appellant was informed by email on 9 June 2017 that the DWP was seeking to rely on s36 FOIA, the Appellant would not have known the factors upon which the DWP relied, and was not given the opportunity to comment. However, the Appellant has now had the opportunity to make submissions on the public interest test and we are now able to fully take these into account when considering this issue afresh in the appeal.

25. We fully understand that the Appellant's interest is that the DWP should be more accessible to service users, and that the Appellant is of the view that it can be very difficult for service users to gain access to decision-makers in the DWP. It is not our role to form a view on these issues, but it is difficult to see how the disclosure of the personal work email details of directors and ministers, who do not deal with claims or queries on a day to day basis, and are responsible for the overall running of the DWP, could improve access for service users, rather than making it more difficult for the DWP to operate effectively .

26. Although there is, as the Commissioner recognises, a general public interest in the disclosure of information held by public authorities, there is also a public interest in enabling a public authority to carry on its business without the risk of disruption from inappropriately targeted emails from members of the public, or deliberate attempts to sabotage the running of the public authority through 'electronic disruption' attempts. We do not agree with the Appellant that, because the DWP serves the public and makes decisions about the claims of individuals, that it is automatically in the public interest to disclose personal work email addresses of ministers and directors of the DWP.

27. Thus, even before we take into account the QP's reasonable opinion on the likelihood of prejudice, it is our view that the public interest is strongly in

favour of withholding the information. Taking into account the QP's opinion reinforces our view on this issue.

Point 3 of the request

28. In relation to point 3 of the Appellant's request, we accept the DWP's submission that the correspondence addresses of the relevant individuals (the directors and ministers referred to in the first and second points of the request) have been disclosed. An issue arose as to whether the request encompasses information relating to Regional Directors. It seems to us that the DWP was correct in interpreting the request so as not to include this job description. The DWP also explained that in any event the title Regional Director was not widely used.

Section 40(2) FOIA

29. The DWP also rely on the exemption in s40(2) FOIA. The Commissioner did not deal with this in her decision notice. We have agreed with the Commissioner and found that the exemption in s36(2)(c) FOIA applies. In these circumstances we do not go on to consider whether the exemption in s40(2) FOIA also applies. This is an approach which has the approval of the UT in *Malnick* (paragraph 109) where it explained:-

> 109. …the role of the FTT where a public authority has relied on two exemptions ('E1' and 'E2') and the Commissioner decides that E1 applies and does not consider E2. If the FTT agrees with the Commissioner's conclusion regarding E1, it need not also consider whether E2 applies.

CONCLUSION

30. Therefore, we dismiss the appeal in this case. Our decision is unanimous

Signed Stephen Cragg QC

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 31 October 2018.

Promulgated: 06 November 2018.