First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0108

Heard at Field House on 9 October 2018

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Dr Henry Fitzhugh
and
Ms Anne Chafer

Between

Ben Lotz

Appellant

And

The Information Commissioner

1st Respondent

And

The Department of Work and Pensions

2nd Respondent

The Appellant represented himself

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 FS50694457, dated 1 May 2018.

2. On 15 March 2017, the Appellant wrote to the Department for Work and Pensions (DWP) to ask for information in the following terms (reproduced exactly):-

   (a) Can the DWP please provide element 1 (the DWP team-email-addresses) as described in para 13 of the DWP submission (in case EA/2016/0262) from 20-1-2017—in the original form, i.e. all current such addresses – from the third-party-supplier.
   (b) and only if this is within the cost-limit, please also include element2 (the team-names/descriptions) where these are readily available, and element3 (the locations) where these are readily available.
   (c) But please note, that I am happy to extend the costs-limit by paying for a few extra hours. The below section "My Expectations" shall form part of this request too. If you still need more clarification or encounter a problem, please ask me immediately.

3. The "My Expectations" section was not reproduced in the Commissioner's decision notice because the expectations 'were not relevant to the exemption that the DWP came to rely on'. Essentially, this section included the Appellant's calculations as to how the DWP could provide the information and how long it should take to do so.

4. The DWP responded on 12 April 2017 to say that it had identified some 32,000 team email addresses falling within the scope of the request. The DWP explained that it had decided to disclose the public facing email addresses to the Appellant, but those team email addresses which were solely for internal use were being withheld on the basis that their release would, or would likely to, prejudice the effective conduct of public affairs

and were therefore exempt from disclosure by virtue of s36(2)(c)FOIA. Over 900 addresses with additional information were disclosed to the Appellant.

5. There was an internal review on 20 July 2017 which upheld the decision and the Appellant complained to the Commissioner on 3 August 2017.

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 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 Lord Henley. Lord Henley was provided with information by the DWP (by way of a briefing from the Deputy Director of Digital Workplace & Technology Platforms dated 5 April 2016) which can be summarised as follows:-

    (a) Out of the 32,000 team email addressed, 6,100 received external emails and the rest were therefore assessed to be for internal use only.

    (b) Releasing around 28,000 internal team emails would be likely to significantly disrupt DWP business, and run a real risk of electronic disruption and vulnerability to hackers or 'denial of service' attacks.

    (c) Incorrect public use of internal email addresses would be likely to lead to disruption and delay as correct routing of such emails was undertaken. Such disruption was not in the public interest.

13. Lord Henley gave his opinion on 12 April 2017 that the exemption under s36(2)(c) FOIA applied. 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.

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

    (a) The general principle of achieving transparency and accountability through the disclosure of information held by public authorities.

    (b) The DWP stated that it already publishes the contact details that service users need to contact the DWP (including complaints information).

(c) Internal team emails are not resourced to deal with the public directly.

(d) FOIA disclosure puts the information into the public domain, and there is a real risk of inappropriate use of the email information.

15. The Commissioner did not directly take into account the QP's opinion in considering the public interest balance (as required by *Malnick*) but in any event concluded that the public interest balance was in favour of withholding the information.

THE APPEAL AND RESPONSE

16. The Appellant appealed this decision on 21 May 2018. He was concerned about the methodology used to identify the public facing email addresses which had been disclosed to him. He thought that any emails belonging to teams of decision makers should be disclosed as they make decisions about individual members of the public. He contested whether the s36(2)(c) FOIA exemption applied, and if it did whether the public interest favoured non-disclosure (he said he strongly contested whether benefit claimants were already provided with sufficient contact details already). The public interest also included people being able to access their rights and entitlements. The Appellant also complained about the processes adopted by the Commissioner in contacting the DWP for information, and in delays in the process. He pointed out that his requests under elements 2 and 3 (see above) had not been dealt with.

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

(a) The Appellant's request in the current format had emerged from a previous request which the DWP had resisted on the grounds that it exceeded the applicable costs threshold.

(b) The DWP had explained the process of identifying external facing emails as follows:-

(i) From the initial 32,000 addresses all those which had not received an external email in the last six months were excluded;

(ii) The remaining 6,143 addresses were contacted to enquire if the address was used by the general public to contact the team and, if so, the team's job titled and location. Reminders were sent to 2000 addresses that did not reply;

(iii) 915 addresses were confirmed as public facing and these were disclosed to the Appellant, with job title and location. 4306 confirmed that they were not public-facing and these were not disclosed, and neither were the 922 addresses where no response was received.

(c) The Commissioner agreed with the methodology used and that the opinion of the QP based on the methodology was reasonable.

(d) The points made by the Commissioner in relation to the public interest test (see above) were re-iterated.

(e) It was accepted that elements 2 and 3 have not been addressed either by the Commissioner or in the submission made to the QP (and the QP's opinion). The Commissioner suggested that the DWP be added as a party to address these issues (this was done).

18. The DWP's response to the appeal echoes much of what the Commissioner says. In relation to elements 2 and 3 the DWP note that these were expressly

described as being subject to the cost limit, and so far as the Appellant was pursuing these aspects of the request, the information was exempt under s12 FOIA because the cost of complying with the request would exceed the appropriate limit.

19. Later in the response, the DWP explains that it had agreed that it would not rely on s12 FOIA in respect of element 1 of the request and that it had taken approximately 40 working days to comply with this aspect. It is noted that the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004 set the appropriate limit at £600 for central government departments. In cases where the cost of complying with the request is based on the time to comply with the request, DWP must apply a rate of £25 per hour, which amounts to 24 hours work. There is a skeleton argument from the DWP which re-iterates the points in its Response.

20. The Appellant also submitted a skeleton argument for the hearing. He objected to the way that the DWP had decided which email addresses were external addresses, and argued that the information to the QP had been incomplete (for example the QP was not provided with all the relevant email addressed). He describes the QP's opinion as 'fuzzy', and therefore it is not clear to what extent that s36(2) FOIA applied. He accepts that Lord Henley was a QP at the time he provided his opinion. He was of the view that there should have been more differentiation between the various teams at the DWP when considering whether to disclose email addresses. He disputed whether there was a likelihood of electronic disruption if the withheld information was disclosed, and said that this was not 'inevitable'. He did, however, accept that a reasonable person might think that the risk of disruption was higher than 50%. He thought it was right that DWP should disclose more email addresses as 'the DWP cannot serve the public and its service-users effectively if it hides its contact-details from them' and emphasised that without service-users there would be no reason for the DWP to exist.

21. The Appellant very ably emphasised these points in the oral hearing. In particular he took us to a table he had created of various teams to indicate what he called 'the fuzziness' of the QP's opinion. He addressed us on whether the public interest favoured disclosure of team email addresses. The list included Job Centre teams, data protection teams, technological support teams, senior management and finance teams. In each case the Appellant urged us to decide whether disclosure would be appropriate, rather than take the approach presented by the DWP of simply attempting to distinguish between external and internal emails. There were a number of other documents submitted by the Appellant which made much the same points.

THE TRIBUNAL'S CONSIDERATION

22. The general approach of the DWP was that it would be likely to be (at least) disruptive of its work if email addresses which were used solely for internal communications were disclosed to the Appellant, and which could then be disseminated to the general public. The concern is both that disclosure would lead to many emails being sent to inappropriate email addresses and an inordinate amount of time would need to be spent ensuring that emails were properly redirected. In addition, the disclosure of thousands of internally used 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.

23. The DWP decided that it would provide the external facing email addresses to the Appellant – the practical problem was deciding which emails these were out of the 32,000 total of addresses. It is our view that sifting out all those email addresses which had not received an external email in the last six months was a sensible way to approach the task: either such an email address was not in use or, in truth, was only receiving internal traffic. It also seems

sensible for the DWP to make a specific enquiry to the approximately 6000 email addresses remaining as to whether they were external facing or not. As a result of responses, the Appellant was provided with over 900 DWP email addresses and further information relating to them.

24. It seems to us that as a result of this exercise it was reasonable for the QP to offer an opinion that disclosure of further email addresses 'would prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs'. The DWP had done its best to identify externally used email addresses. Although the Appellant thought that the public should be entitled to have internal email addresses of at least some teams, the only real outcome if these were disclosed would be the risk of disruption and inappropriately sent emails from the public.

25. Indeed, as the Appellant's skeleton argument accepts that a reasonable person could find that there was a likelihood of electronic disruption if the withheld information were disclosed: his point is that it would not be inevitable. Even without that acceptance we would find that the QP's opinion was reasonable, and therefore the s36(2)(c) FOIA exemption applies.

26. 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.

27. We fully understand that the Appellant's approach is that the DWP should be more accessible to service users, and that he believes that it is often very difficult for service users to gain access to those who make decisions about their claims. However, whatever the merits or demerits of the current DWP system of communication with claimants (about which we cannot express a view on the information we have), it is impossible for us to see how the disclosure of thousands of internal email addresses could improve access, rather than cause chaos and disruption.

28. Thus although there is, as the Commissioner recognises, a general public interest in the disclosure of information held by public authorities, that public interest can be eclipsed by the public interest in enabling a public authority to carry on its business without the risk of disruption from a multitude of 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 internal email addresses.

29. While we appreciate the Appellant's attempts to segment the DWP email addresses, and to make submissions about the desirability of disclosure of email addresses in different areas, the same problem remains. What he is asking for is email addresses which the DWP uses for internal traffic only, and these are not the email addresses used for communicating with the public.

30. 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.

31. In relation, to elements 2 and 3 of the request, we note that the DWP has waived the usual costs restriction in enabling it to deal with element 1 which, although it is said that 40 days were spent processing the request, has led to the disclosure of over 900 additional email addresses and associated information to the Appellant. Processing elements 2 and 3 clearly involve further work beyond the £600, 24 hours limit, and we find the DWP is entitled to rely on the exemption in s12 FOIA in relation to the additional parts of the

request. The FOIA scheme does not enable a requester to pay for additional hours as suggested by the Appellant.

32. 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.

(Case considered by Panel on 9 October 2018).

Promulgated: 06 November 2018