



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

Appeal Reference: EA/2015/0194

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Mr Nigel Watson
and
Ms Alison Lowton

Between

Gabriel Webber

Appellant

And

The Information Commissioner

The Cabinet Office

Respondents

Sitting at Fleetbank House on 22 October 2018

Representation: The Appellant appeared in person

The Commissioner was not represented

The Cabinet Office was represented by Mr Matthew Hill

DECISION AND REASONS

BACKGROUND

1. This is an appeal against the Commissioner's decision notice dated as long ago as 17 August 2015. It is a case with a history: a differently constituted Tribunal panel convened to consider this case on the papers on 22 February 2016 and issued its first decision on 22 March 2016, upholding the Appellant's appeal in part. At that time the Cabinet Office was not a party to proceedings.

2. However, that decision was subject to an appeal to the Upper Tribunal (UT) by the Cabinet Office (by that time joined as a party) and by the Appellant, largely in relation to the way in which the Tribunal revisited its decision after the initial promulgation. The details of that do not concern us in this decision. Suffice it to say that Judge Wikeley in the UT summarised the UT's decision (*GW v (1) The Information Commissioner, (2) The Cabinet Office* [2017] UKUT 312 (AAC)) as follows:-
 4. The short version of my decision is that the First-tier Tribunal...made a material error of law in its approach to the use of its power of review under section 9 of the Tribunals, Courts and Enforcement Act (TCEA) 2007 when making its second and post-review decision. I therefore allow Mr Webber's appeal and set aside the Tribunal's second decision. I am not in a position to remake the Tribunal's decision myself. I therefore send the case back for re-hearing before a differently constituted First-tier Tribunal.

3. We are that differently constituted Tribunal and we heard the case on 22 October 2018 at an oral hearing and with the Cabinet Office (but not the Commissioner) represented before us. Mr Webber appeared in person.

BACKGROUND AND DECISION MAKING PROCESS

4. It is not necessary to refer at any length to the UT decision. However, Judge Wikeley set the scene at the start of his decision in two paragraphs which are worth setting out. The Judge said as follows:

Politicians, expenses and freedom of information

1. Where the two words “politicians” and “expenses” appear in close proximity to each other, the phrase “freedom of information” will not be lagging far behind. The present appeal is not just about politicians and their expenses, but about (former) Prime Ministers and their expenses. A former Prime Minister may claim a Public Duty Cost Allowance (PDCA) for office and secretarial expenses incurred in connection with their public duties. The PDCA is currently set at a maximum of £115,000 a year for each previous holder of that office. The Cabinet Office publishes the total annual amount paid to each former Prime Minister under the PDCA.

2. Mr Webber is a freelance journalist who made a request to the Cabinet Office under the Freedom of Information Act 2000 (FOIA) for more detailed information about PDCA expenditure. The present appeal concerns his request for copies of each former Prime Minister’s receipts and other supporting documentation (“the disputed information”). The request relates to PDCA claims made by (or made on behalf of) John Major, Tony Blair, Gordon Brown and the late Lady Thatcher.

5. The Appellant’s request was made on 29 June 2014, in the following terms:

“According to a PQ [Parliamentary Question] answered by Lord Wallace of Saltaire, former Prime Ministers can claim an allowance if they provide receipts or other supporting documentation.

Please could you release the amount claimed by each former Prime Minister in each calendar year 2005-2013 inclusive, and also provide a copy of all receipts or other supporting documentation submitted in respect of this allowance since January 2012.

If the cost threshold obstructs this then please provide ONLY copies of receipts and supporting documentation since June 2013.”

6. The Cabinet Office's response to the request was dated 21 July 2014. It declined to disclose the total amounts claimed by each former Prime Minister (PM) on the basis that the information was accessible by other means and was intended to be published: therefore the exemptions in sections 21(1) and 22(1) applied. In relation to the receipts and other supporting information requested, the Cabinet Office declined to disclose the information on the basis that it was third party personal data, and therefore s40(2) FOIA applied. There was an internal review in relation to this second aspect of the request, but the decision was upheld by the Cabinet Office.
7. In his complaint to the Commissioner, the Appellant said that he did not accept the Cabinet Office's refusal under section 40(2) FOIA to disclose the copy of receipts or other supporting documentation information sought in the request. The Commissioner investigated the complaint, and the Cabinet Office notified its intention to rely on s1(1) FOIA (information provided in confidence) to justify the outstanding decision not to disclose, as well as continuing to rely upon section 40(2) FOIA.
8. As the Commissioner's decision mainly deals with the exemption in s41(1) it is appropriate to set that out at this stage. Section 41(1) FOIA provides as follows:-
 - (1) Information is exempt information if -
 - (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
9. This is an absolute exemption, but there is a public interest balancing exercise to be applied as part of the common law in relation to a breach of confidence.
10. The Commissioner's decision notice decided that the information was exempt from disclosure under section 41(1) FOIA. The Commissioner decided that

the information had been obtained by the Cabinet Office from a third party. For the purposes of s41(1)(b) FOIA, and whether disclosure to the public would constitute an actionable breach of confidence by the Cabinet Office, the Commissioner applied the test in *Coco v A. N. Clark (Engineers) Limited* [1968] FSR 415. This requires the application of a three stage test as to whether (a) the information in question had the necessary quality of confidence, (b) the information was imparted in circumstances importing an obligation of confidence, and (c) the unauthorised use of the information would be of detriment to the confider. The Commissioner found that all these tests were met.

11. The Commissioner also considered whether the Cabinet Office would have a public interest defence to disclosure of the information. The Commissioner decided that any public interest would be met by disclosure to the public of the total amounts claimed by the former PMs, and the disclosure of details would add little to the public understanding of this expenditure. Therefore the Commissioner concluded that that the Cabinet Office would not have a public interest defence in disclosing the information sought.

12. Having decided that the information was exempt from disclosure under section 41(1) FOIA, the decision notice does not go on to determine whether the information is also exempt under s40(2) FOIA, although the Commissioner does say that she considers it likely that s40(2) FOIA would be applicable.

APPEAL

13. The Appellant challenged this decision on appeal. However, he accepted that the information was obtained by the Cabinet Office from other persons, and that the information has the necessary quality of confidence, and we do not need to address those issues further.

14. We have considered all of the Appellant's written and oral arguments, but his main points were that:-

(a) There needs to be more transparency about the PDCA. It is unclear what 'public functions' former PMs perform and what they need to employ staff to do in relation to these functions.

(b) Former PMs must have known that their claims would attract FOIA requests, but did not raise the question of confidentiality at the time they submitted claims with supporting documentation,

(c) As the Cabinet Office publishes some information about these claims, then the details of the claims are not confidential.

(d) The evidence of Ms Carter (see below) is hearsay and representatives of the former PMs' offices could have given evidence.

(e) Disclosure would increase the public's understanding on how the PDCA is spent, and the public interest in more detail of the claims would outweigh the employees' interest in privacy, so long as names are redacted.

15. The Cabinet Office was represented at the hearing of the appeal by Mr Matthew Hill, and (for the purposes of s41(1) FOIA) his arguments on whether information was imparted in circumstances importing an obligation of confidence were presented in a skeleton argument, as well as orally, and can be summarised as follows:

(a) The information provided by the former PMs included employees' names, details, salary levels, bank account details, etc. The employees were not public figures and were not involved in the correspondence.

- (b) A duty of confidence arose because of the nature of the information being provided to the Cabinet Office.
- (c) The statement of Sharon Carter (Head of Propriety and Ethics at the Cabinet Office), who also gave evidence at the hearing, confirmed that the former PMs did not expect the information to be published. She said that the heads of the offices concerned had confirmed to her that they were operating in the expectation of confidence.
- (d) Six arguments were put forward as to why disclosure would cause detriment to the offices of the former PMs. These range from a loss of reasonably anticipated confidentiality, to possible identity theft, to weakening the bonds between government and the former PMs' offices, and detriment to employment relationships, morale and cohesion (especially if individual salary levels are published).

DISCUSSION AND DECISION

16. Despite the able and forceful way in which the Appellant has presented in his case in writing and orally, we agree with the submissions of the Cabinet Office and the Information Commissioner, that the information was provided in circumstances importing an obligation of confidence for the purposes of s41(1) FOIA. Unlike the first Tribunal, we now have the benefit of the evidence of Sharon Carter (as referred to above) by way of a witness statement signed on 29 January 2018. She states that she has 'taken the view' of the offices of the former PMs, who have told her that they were very clear that they were operating in the expectation of confidence.

17. This is hearsay evidence of which we are entitled to consider. We note that the views were taken several years after the request was made and several years after the documentation was provided to the Cabinet Office. We also recognise, as did the Commissioner, that some of the documentation

provided include the words 'Private and Confidential', although as the Commissioner acknowledged this was not determinative of the issue.

18. In our view, the evidence that has been provided makes the Cabinet Office's case that the information was provided to it in confidence. Although there is no contemporaneous documentation or evidence of discussion or correspondence between the former PMs' offices and the Cabinet Office where the confidentiality of the information provided has been considered, we also do not doubt that the offices of the former PMs did in fact tell Ms Carter in 2018 that they were operating on an expectation of privacy when asked the question some years after the information was provided to the Cabinet Office.

19. That evidence does not, of course, have the same quality as contemporaneous documentary evidence that these issues had been considered at the time. But the evidence does make sense when it is considered that the information imparted to the Cabinet Office contained details of payments and salaries of individuals, and in our view the offices of the former PMs cannot realistically have expected that the Cabinet Office would have been free to publish and disclose this information, where it was provided to support the overall claims made by the former PM's offices. In relation to detriment caused by the disclosure, Ms Carter highlights the views received that disclosure of individual salary levels could have detrimental effects in the relationships between staff members. We accept this evidence of detriment alongside the obvious detriment for an individual of having confidential information disclosed in circumstances where there is a reasonable expectation of maintaining confidentiality of private information.

20. However, we also have to consider whether, in action for breach of confidence, the Cabinet Office would have had a public interest defence for disclosing the information. We were directed to the first tier tribunal decision in *Armstrong v ICO* (Case no: EA/2014/0165, 3 February 2015) where the FTT

set out the principles to be applied, citing from the leading textbook, and we repeat what was said in that case as follows:-

10. Toulson and Phipps on Confidentiality (3rd Edition) includes a summary of conclusions reached by the authors at the end of a comprehensive review of the law on the public interest defence, as it has developed under the impact on English law of the European Convention on Human Rights. The summary is in the following terms (paragraph 6-075):

“Although each case has to be examined on its own facts, the following general principles are suggested:

(1) Respect for confidentiality is itself a matter of public interest.

(2) To justify disclosure of otherwise confidential information on the grounds of public interest, it is not enough that the information is a matter of public interest. Its importance must be such that the duty otherwise owed to respect its confidentiality should be overridden.

(3) In broad summary either the disclosure must relate to serious misconduct (actual or contemplated) or it must otherwise be important for safeguarding the public welfare in matters of health and safety, or of comparable public importance, that the information should be known by those to whom it is disclosed or proposed to be disclosed.

(4)

(i) Even if the information meets that test it does not necessarily follow that it would be proper for the defendant to disclose it.

(ii) The court must consider the relationship between the parties and the risks of harm which may be caused (or avoided) by permitting or prohibiting disclosure, both in the particular case and more generally. For example, if the law inhibits a doctor from disclosing information about a patient which may affect another person, it may lead to risk of avoidable injury or death; but if it permits a doctor to do so, it may impair a patient’s willingness to confide in the doctor and receive treatment.

(5) Ultimately the court has to decide what is conscionable or unconscionable, which will depend on its view of what would be acceptable to the community as a fair and proper standard of behaviour. This requires the court to make an evaluative judgment, but it does not have an unfettered discretion.

(6) In cases where the party claiming confidentiality is a branch of Government, or a body performing a governmental function, a separate principle applies. In such cases detriment to the public interest is an essential ingredient of the cause of action.

21. Applying these principles, it is our view that there is nothing of sufficient importance to override the public interest in the respect for confidentiality. We accept that there is a public interest in knowing that former PMs make claims for and receive public funds in respect of their ongoing public functions. We also accept that there may be some public interest in understanding what those functions might be. However, this is not sufficient, in our view, to override the public interest in maintaining confidentiality.

22. In addition, as it is the Cabinet Office (and the former PMs) claiming confidentiality, we find, as required by (6) in the summary from Toulson and Phipps above, that there is a detriment to the public interest in disclosing salary and payment figures made to individuals.

23. In our view therefore the exemption in s41(1) FOIA applies in this case.

SECTION 40(2) FOIA

24. Having reached this finding, it is not necessary for us to reach a conclusion as to whether the withheld information is exempt under section 40(2) FOIA. We note that the Commissioner did not make a determination on s40(2) FOIA in

her decision notice because she upheld (as we do) the Cabinet Office's reliance on s41(1) FOIA.

25. The correct approach for us to follow in such circumstances is now set out in paragraph 109 of the Upper Tribunal's decision in the case of *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) :-

109. We summarise the effect of our analysis on 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.** However it would be open to the FTT to consider whether E2 applies... On the other hand, where the FTT disagrees with the Commissioner's conclusion on E1 it must consider whether E2 applies and substitute a decision notice accordingly. **(emphasis added)**

26. Having been alerted to the possibility (at least) that the Tribunal would consider the exemption in s40(2) FOIA (third party personal data), all parties addressed the issue in written submissions and/or in oral submissions at the hearing. In addition, we spent a short time with Mr Hill in a closed session considering the withheld material and examining whether it amounted to personal information.
27. It suffices for the purposes of this judgment to indicate that in our view, once the various tests relevant to s40(2) FOIA have been applied (including the consideration of public interest factors which have been discussed above already), it is very likely that the information (if any) that would be disclosed would be very limited indeed and not provide the Appellant with much more than has been disclosed already in relation to his request. However, like the Commissioner, given our view on s41(1) FOIA, we have not reached a final decision on the s40(2) FOIA issue.

CONCLUSION

28. For the reasons set out above we are satisfied that that the Cabinet Office was entitled to rely on s41(1) FOIA to withhold the information and the appeal is dismissed.

29. This decision is unanimous.

Signed *Stephen Cragg QC*

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 30 November 2018.

Promulgation date: 3 December 2018.