Appeal number: EA/2017/0293

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

JONATHAN CORKE **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondents**
THE HOME OFFICE

TRIBUNAL: **JUDGE ALISON MCKENNA**
Mr PAUL TAYLOR
Mr ANDREW WHETNALL

Determined on the papers, the Tribunal sitting in Chambers on 14 March 2019

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. The background to this appeal is the resignation of Dame Justice Lowell Goddard from her position as Chair of the Independent Inquiry into Child Sexual Abuse ("IICSA") in August 2016. The Appellant's request was for information held by the Home Office about a meeting concerning the IICSA in July 2016, involving Mark Sedwill, the Permanent Secretary at the Home Office.

3. The Appellant made a request to the Home Office on 21 October 2016 in the following terms:

> *"Please provide copies of all notes, minutes and records of a meeting involving Mark Sedwill on July 29, 2016, relating to the IICSA.*
>
> *Please provide copies of all emails sent and received by Mark Sedwill on (and including) July 29, 2016, to (and including) 5 August 2016, which relates in any way to the meeting and the issues raised at the meeting."*

4. The Home Office refused the information request on 11 January 2017 in reliance upon sections 36 (2) (b) (i) and (ii) and 40 (2) of the Freedom of Information Act 2000 ("FOIA"). It maintained its position following an internal review on 6 April 2017. The Appellant complained to the Information Commissioner.

5. The Information Commissioner issued Decision Notice FS50678988 on 27 November 2017, in which she referred to the material within the scope of the request as being an e mail about a meeting which took place on 28[1] July 2016 between the Permanent Secretary and the Secretary to IICSA and an associated note dated 29 July 2016. Having considered the withheld information and the opinion of the Qualified Person, she concluded at paragraph 23 of the Decision Notice that the opinion was a reasonable one so that sections 36 (2) (b) (i) and (ii) FOIA were engaged. She went on to consider the public interest test under s. 2 (2) (b) FOIA in paragraphs 36 to 39 of the Decision Notice. Having weighed the competing arguments, she concluded at paragraph 39 of the Decision Notice that, whilst there is a general public interest in transparency about the IICSA, and a special interest amongst the victims of abuse at the heart of the inquiry, these considerations did not override the public interest in the Home Office's ability to carry out its affairs effectively.

6. The Information Commissioner thus found that the Home Office was entitled to rely on sections 36 (2) (b) (i) and (ii) to withhold the requested information. She required no steps to be taken by the Home Office. She did not find it necessary to determine the application of s. 40 (2) FOIA.

Appeal to the Tribunal

[1] This date is acknowledged to be a typographical error. It should read 29 July.

7. The Appellant's Notice of Appeal dated 20 December 2017 is understood to rely on three grounds of appeal as follows. Ground one is that the Decision Notice was erroneous in regarding "*the issue at the centre of my request"* as still "live" for the purposes of s. 36 FOIA following Justice Goddard's resignation. He asserted that the "issue" had been finalised by the release of a press statement and the appointment of a new Chair for IICSA. Ground two is that the Decision Notice was erroneous in concluding that the release of the requested information "could" have a chilling effect rather than applying the statutory test of "would" or "would be likely to" have that effect. Ground three refers to other Decision Notices and suggests that the Information Commissioner's approach in this case is inconsistent with her approach in other cases.

8. The Information Commissioner's Response dated 5 February 2018 maintained the analysis as set out in the Decision Notice. In particular, it was submitted that the public disclosure of the requested information could deter applications for positions as Chairs of inquiries in the future; that the withheld information contained free and frank exchanges of views of the type which should not in future be hampered through fear of disclosure under FOIA; that disclosure in this case would be premature as, although Justice Goddard resigned on 4 August 2016, the public statement was not issued until 14 October 2016 so the issues remained current at the time of the request, which was only one week after the statement; that the Home Office's public statement had accurately summarised the position and there was limited value in disclosure of the incremental information.

9. Paragraph 15 of the Information Commissioner's Response states that:

> *"At the time of his request, the IICSA was in the relatively early stages of its very delicate and important work. It had suffered setbacks relating to appointments of the Chair: before Justice Goddard, both Baroness Butler-Sloss and Fiona Wolf had stepped down from that position. Those setbacks had attracted widespread media coverage. At the time of Mr Corke's request, it was important for the IICSA to be able to focus on its work without further distraction relating to such issues. In those circumstances, the issues addressed in the withheld information remained current at the time of Mr Corke's request."*

10. The Home Office was joined as a Respondent to the appeal and filed a Response dated 4 April 2018. Whilst generally supporting the Decision Notice, it also responded to the Appellant's grounds of appeal as follows. In relation to ground one, it referred back to paragraph 15 of the Information Commissioner's Response (quoted in full above) and the issues concerning IICSA being *"still very much live"* at the time of the request; in relation to ground two, it is submitted that the Decision Notice read as a whole is clear that the relevant statutory test was applied notwithstanding the use of the word "could" in paragraph 22; as to ground three, the relevance to this case of fact-specific decisions in other cases is disputed.

11. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising some 200 pages, including submissions made by all parties, for which we were grateful. We also received a Closed Bundle, containing the withheld information and documents which were revelatory of it. The Closed Bundle was not disclosed to the Appellant.

The Law

12. Section 36 FOIA (where relevant) provides as follows:

> *"Prejudice to effective conduct of public affairs.*
>
> *(1) ...*
>
> *(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)would, or would be likely to, inhibit—*
>
> *(i) the free and frank provision of advice, or*
>
> *(ii) the free and frank exchange of views for the purposes of deliberation, or*
>
> *(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

13. Section 36 FOIA is a "qualified exemption" so that the public interest test under s. 2 (2) (b) FOIA must be applied.

14. The Information Commissioner referred at paragraph 5 of the Decision Notice to a first instance Decision in the *Brooke* case, but a pertinent Upper Tribunal Decision was issued subsequently in March 2018. This was the Decision of a three-judge panel in *IC v Malnick and ACOBA* [2018] UKUT 72 (AAC)[2], which we are now bound to apply to this appeal.

15. We note that in *Malnick* paragraph [29] the Upper Tribunal commented that "*…although the opinion of the QP is not conclusive as to prejudice…..,it is to be afforded a measure of respect*." and at paragraph [56] that "*reasonable*" in section 36(2) means substantively reasonable and not procedurally reasonable.

16. In considering the engagement of s. 36 FOIA, the Upper Tribunal took the following approach at paragraph [31]:

> "*…Section 36 …confers a qualified exemption and so a decision whether information is exempt under that section involves two stages: 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.*
>
> *32. The QP is not called on to consider the public interest for and against disclosure. Regardless of the strength of the public interest in disclosure, the QP is concerned only with the occurrence or likely occurrence of prejudice. 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*

[2] https://www.bailii.org/uk/cases/UKUT/AAC/2018/72.pdf

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)."

17. The Upper Tribunal found at paragraph [65] of *Malnick* that the consideration of the public interest balancing test was flawed in that case by the FTT either ascribing no weight at all to the QP's opinion or, if it did, failing to give it appropriate weight at the second stage of the process it had described.

18. The Information Commissioner's Decision Notice was issued under s. 50 (2) FOIA, in respect of which a right of appeal to this Tribunal is conferred by s. 57 FOIA. The powers of the Tribunal in determining this appeal are those set out in s.58 FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

19. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Evidence

20. The Tribunal received open and closed witness statements from Zoe Wilkinson, a Senior Civil Servant and Head of the Home Office Sponsorship Unit, which is responsible for managing the Department's relationship with its arms-length bodies and inquiries. She explained that the "Qualified Person" in this case was the Minister for Vulnerability, Safeguarding and Counter-Extremism. A redacted version of the submission to the Minister was included at page 124 of the Open Bundle, as was the Minister's private office confirmation on 10 January 2017 that the Minister was of the opinion that the disclosure of the requested information "would" prejudice the effective conduct of public affairs.

21. Ms Wilkinson's open evidence (which the Appellant chose not to challenge in cross examination at an oral hearing) at paragraph 16 of her witness statement was that:

> *"…This is a very high-profile inquiry which is of course on-going. In addition to …None of this information was created with the expectation that it would be made public. ….and it is clear that it was not intended for wider consumption".*

Thus, she made it clear to the Appellant that the scope of his request went wider than the issue of Justice Goddard's resignation, without of course revealing the other matters referred to in the withheld information. We consider these issues in the Closed Annexe to this decision.

22. At paragraphs 33 to 35 of her open witness statement, Ms Wilkinson states that, at the time of the Appellant's request, there was significant media interest into questions regarding *"the health and future of the Inquiry and its ability to maintain the public's confidence and deliver its objectives. [In]… October 2016 …the newly appointed replacement Chair …appeared before the Home Affairs Select Committee …at a time when public confidence was low and needed to be restored in order to retain the confidence of victims. Disclosure of private discussions regarding the Inquiry at that time could have had a further destabilising impact on the future of the Inquiry. …public confidence in the inquiry was fragile and may not have withstood further media speculation through disclosure…".*

23. The redacted submission to the Minister included in the Open Bundle refers to a "*high risk*" that the information requested "*would*" inhibit the free and frank provision of advice, the free and frank exchange of views for the purpose of deliberation and that it "*would*" prejudice the effective conduct of public affairs more widely[3]. In particular:

> *"*5. *We believe that to disclose emails containing discussions between the Home Office and the Inquiry would breach the implied confidentiality of such discussions and arguably deter future candidates from applying for high profile positions of this nature, thereby prejudicing the effective conduct of public affairs. We also believe that to disclose emails containing discussions between Ministers and officials would prevent opinions being discussed openly and thereby prejudice the free and frank exchange of views and the free and frank provision of advice".*

24. Paragraph 10 of the submission refers to the views of the Director General of Propriety and Ethics, that discussions between sponsoring Departments and Inquiries should be protected by a safe space, so that there can be free and frank discussion without concern about premature disclosure.

25. The un-redacted submission to the Minister is contained in the Tribunal's Closed Bundle. Its contents, along with Ms Wilkinson's closed evidence and the Home Office's Closed Submissions are referred to in the Closed Annexe to this Decision.

Submissions

26. All parties made written submissions in advance of the panel determination.

27. The Appellant's several written submissions are overwhelmingly concerned with Justice Goddard's resignation and the question of whether that matter was still

[3] Thus, also apparently relying on s. 36 (2) (c) FOIA, although this reliance was not determined by the Decision Notice.

"live" at the time of his request. He refers to the particular interest of the survivors of abuse in receiving the requested information, although we note that this is not in evidence before us. The Appellant's most recent submissions also refer to some new arguments which are not remotely related to his three grounds of appeal and which we have not found it appropriate to determine in the circumstances.

Conclusion

28. We reject the Appellant's ground two that the Decision Notice addressed the wrong statutory test. Looking at the Decision Notice as a whole, it is clear that the relevant issues were considered. We find no error of law in the Decision Notice as a result of the term used in paragraph 22.

29. We also reject the Appellant's ground three that the Decision Notice in this case is inconsistent with others on similar issues. Decision Notices themselves have no precedent value and the Information Commissioner is required to take a fact-specific approach to each complaint she determines.

30. We note that the Appellant's first ground of appeal refers to "*the issue at the centre of my request"*. Whilst it is made clear from all his correspondence and submissions that the Appellant's interest is in the narrow issue of the resignation of Justice Goddard from IICSA, we must consider the terms of his request as it was made, in which he refers to a far wider range of information concerning a meeting about IICSA and the issues raised at that meeting. It would have been open to him to narrow his request so that its scope related to information concerning Justice Goddard only, but he did not do so. It follows that we have considered the engagement of s. 36 (2) (b) (i) and (ii) and the public interest test in relation to the full scope of the request, as made, rather than considering only the issue which later emerged as the Appellant's central concern.

31. We have firstly considered carefully whether the Qualified Person's opinion was reasonable in substance, in accordance with approach taken in the *Malnick* Decision. We give weight to the Qualified Person's opinion in circumstances where that person was a Minister in the Department sponsoring IICSA and who can be assumed to be familiar with the sensitivities of the relationship between sponsoring Departments and inquiries generally, in addition to the difficulties this particular inquiry had experienced and was then experiencing.

32. We conclude that the opinion was reasonable in substance, taking into account the matters referred to at paragraphs 20 to 23 above. We also take into account the particular context of the sensitive issues referred to in the withheld information.

33. Turning to the public interest test, we give weight here to the Qualified Person's opinion about the public interest to be found in providing a safe space for discussion between sponsoring Departments and inquiries. We accept the Appellant's argument (as do both Respondents) that there is a public interest in transparency generally, and we also accept that there may be a particular public interest in disclosure of the reasons for Justice Goddard's resignation.

34. However, as we have noted, the Appellant requested information with a scope far wider than just the Judge's resignation and which concerned the IICSA more generally. We accept Ms Wilkinson's evidence that there was, at the time of the Appellant's request, a significant and continuing public interest in protecting the stability of the IICSA under its new Chair and ensuring that it could get on with its

important work. We are satisfied that this factor properly outweighed the factors in favour of disclosure at the relevant time.

35. For all these reasons, we find no error of law in the Decision Notice and now dismiss the appeal.

ALISON MCKENNA **DATE: 03 April 2019**

CHAMBER PRESIDENT **PROMULGATED: 04 April 2019**