First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0020

Decided without a hearing
On 17 July 2019

Before

JUDGE ANTHONY SNELSON
DR HENRY FITZHUGH
DR MALCOLM CLARKE

Between

CABINET OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

MR ANDY WORMS

Second Respondent

DECISION

The unanimous decision of the Tribunal is that the appeal is dismissed.

REASONS

Introduction

1. On 16 February 2018 Mr Andy Worms, the Second Respondent, wrote to the Cabinet Office, a government department with responsibility for supporting

the Prime Minister and Cabinet and the Appellant in these proceedings, requesting, pursuant to the Freedom of Information Act 2000 ('FOIA'), copies of "Facebook Insight Files (posts, videos, page) for the UK Prime Minister official Facebook page ... for the last 3 months of 2017."

2. Insight files are metadata. They consist of tables of numbers. According to the grounds of appeal, para 5, the numbers convey information about such matters as:

(i) the time of day that users visit the page;
(ii) the day of the week that users visit the page;
(iii) the type of content which users view (e.g. posts, photos, links, videos etc);
(iv) the number of 'likes' particular content receives from users;
(v) the number of times particular content is shared by other users;
(vi) the number of friends of followers of the page (being the potential number of persons whom the content can reach);
(vii) the total 'weekly reach' of the page; and
(viii) changes in these patterns over time.

3. The Cabinet Office responded on 15 March 2018, refusing to supply the information and citing FOIA, s35(1)(a) (formulation and development of government policy) and s35(1)(b) (ministerial communications).

4. Mr Worms challenged that response but, following an internal review, the Cabinet Office, while abandoning its reliance on s35(1)(b), maintained its refusal based on s35(1)(a).

5. On 30 June 2018, Mr Worms complained to the First Respondent ('the Commissioner') about the way in which his request for information had been handled. An investigation followed, hampered by delays on the part of the Cabinet Office which bordered on the contemptuous. In the course of it the ground for refusing to disclose the information requested changed again, with s35(1)(a) being jettisoned in favour of s36(2)(c) (effective conduct of public affairs).

6. By a decision notice dated 11 December 2018 the Commissioner determined that the exemption relied upon was not engaged and required the Cabinet Office to disclose the requested information.

7. By a notice of appeal dated 29 January 2019, the Cabinet Office challenged the Commissioner's adjudication. In the accompanying grounds it re-stated its reliance on s36(2)(c) but also prayed in aid s36(b)(i) (free and frank provision of advice) and (ii) (free and frank exchange of views for the purposes of deliberation).

8. The Commissioner resisted the appeal in a document dated 27 February 2019.

9. Having been joined as Second Respondent pursuant to a direction of the Tribunal, Mr Worms delivered a response to the appeal dated 11 March 2019.

10. In a reply of 25 March 2019 the Cabinet Office joined issue with the responses of the Commissioner and Mr Worms, submitting in support two documents relied on as together containing an opinion of a 'qualified person' ('QP') in accordance with the legislation (set out below), namely an advice prepared by an official and an email by a member of the Cabinet Office staff stating that the Minister for the Constitution was "happy to agree" that the exemptions under s36(2)(b)(i) and (ii) were engaged. We will call this the second QP opinion.[1]

11. In its final submissions of 29 May 2019, the Cabinet Office repeated its earlier contention that the requested information was exempt under s36(2)(b)(i) and (ii) and (c).

12. In her submissions dated 11 June 2019 the Commissioner changed course dramatically, contending that the Tribunal should allow the appeal on the basis that s36(2)(b)(i) and (ii) had been validly applied and that the public interest balance came down in favour of maintaining those exemptions.

13. Mr Worms delivered further submissions dated 14 June 2019 resisting the appeal.

14. By a letter to the Tribunal of 17 June 2019 the Cabinet Office confined its case to s36(2)(b)(i) and (ii).

15. The dispute came before us for consideration on paper, the parties being content for it to be determined without a hearing.

The Law

16. FOIA, s1 includes:

> **(1) Any person making a request for information to a public authority is entitled–**
>
> **(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and**
> **(b) if that is the case, to have that information communicated to him.**

17. FOIA, s36 includes:

> **(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 –**
> **…**
> **(b) would, or would be likely to inhibit –**
> **(i) the free and frank provision of advice, or**

[1] An earlier one had been supplied supporting the reliance on s36(2)(c).

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.

…

(4) In relation to statistical information, subsections (2) … shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

In the present context, a "qualified person" means any Minister of the Crown (s36(5)(a)). The term "statistical information" in subsection (4) is not defined.

18. If a qualified exemption, such as any under s36, is shown to apply, determination of the disclosure request will turn on the public interest test under s2(1)(b), namely whether, "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in maintaining the exemption".

19. The appeal is brought pursuant to FOIA, s57. The Tribunal's powers in determining the appeal are delineated in s58 as follows:

(1) 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.

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

The Rival Cases

20. As we have noted, the Cabinet Office's case has undergone a number of iterations, but it is now rested exclusively on s36(2)(b)(i) and/or (ii). It contends, as we understand it, broadly as follows.

(1) The information sought is not 'statistical information'.

(2) If (1) is correct, the Tribunal should find the second QP opinion reasonable and accordingly hold that one or both exemption(s) is/are engaged.

(3) Alternatively, if (1) is incorrect, the Tribunal should form its own view, on the strength of the second QP opinion, that one or both exemption(s) is/are engaged.

(4) The public interest balance favours maintaining the exemptions.

21. The main arguments set out in the second QP opinion are these.

(1) The Insight pages contain detailed information enabling the owners of Facebook pages to develop a better understanding of what topics are of interest to their audiences and what topics are less well received.
(2) Such information helps to inform discussions and advice directed to developing an effective communication strategy.
(3) Release of the information would be likely to:
  (a) have a "chilling effect" on such discussions;
  (b) "impact on" the "safe space" needed for such discussions;
  (c) inhibit ministers and officials from communicating on certain subjects through Facebook;
  (d) "impact on" the candour of advice given to officials.

22. The Commissioner's case in its final form rests on the following propositions.

(1) It is open to the Cabinet Office to rely on s36(2)(b)(i) and (ii) and the second QP opinion.
(2) The information sought is not 'statistical information'.
(3) The second QP opinion is reasonable.
(4) The public interest balance favours maintaining the exemptions.

23. Mr Worms strongly challenged as impermissible the Cabinet Office's repeated changes of position and the Commissioner's willingness to sanction them. On his case, the appeal should fail on that ground alone. In any event, Mr Worms submitted persuasively that the appeal should fail on its merits. The language of the exemptions was not made out and even if it was the public interest balance was against maintaining them.

Analysis and Conclusions

24. The first question is whether it was open to the Cabinet Office to run, or the Commissioner to entertain, "new" exemptions. We are satisfied that there is a clear answer to the question. In *DEFRA v Information Commissioner and Birkett* [2011] EWCA Civ 1606, the Court of Appeal held that it is open to a public authority to raise a new exemption at any point. This is subject to the Tribunal's case management powers. Here there is no question of those powers being exercised to preclude the Cabinet Office from relying on the exemptions under s36(2)(b)(i) and (ii). They were pleaded in the grounds of appeal and so have been part of the case throughout the judicial phase.

25. The second question is whether the disputed information amounts to 'statistical information'(see s36(4)). The Tribunal has not been assisted by clear or cogent argument from any quarter on the 'statistical information' point. [2] In this regard we make no criticism of Mr Worms, who has prosecuted his case

[2] It is a surprising fact that the Commissioner in her decision notice under challenge did not address the question at all.

without the benefit of legal representation. But we would expect much better from the other two parties, whose representatives seemed to the bitter end to be more interested in defending their earlier, contrary positions than in attending to the issues as they ultimately stood. The best we got (from both) was the vague contention that the information sought was not 'statistical information'. No intelligible reason was offered in support. No authority or other guidance has been put before us. We will start with the plain language of the legislation. If metadata in the form of tables of statistics do not constitute 'statistical information' it seems to us less than easy to imagine what sort of material would come within the scope of that term. We have looked in vain for a reason to question our initial view. In *DWP v Information Commissioner*, a decision of the Information Tribunal of 5 March 2007, Ministry of Justice Guidance was adopted, namely that the expression requires "mathematical operations performed on a sample of observations or some other factual information". No doubt such 'operations' would include addition, multiplication and division of numbers so as to produce, for example, the total 'weekly reach' of the Facebook page. We are not aware of any first-instance decision, or binding higher authority, arguing for a different approach. All in all, it seems to us plain and obvious that the information sought in this case is 'statistical information' within the meaning of s36(4).

26. As a result of our reasoning so far, we can put to one side Mr Worms's strenuous arguments about the admissibility (at all) of the second QP opinion and the procedural propriety of presenting a QP opinion in the form of a statement by a third party coupled with a short email from the QP simply adopting its content. The QP opinion simply becomes part of the material through which the Cabinet Office's arguments are conveyed. On the other hand, the disappearance of the QP as a necessary mouthpiece for the public body's maintenance of the relevant exemption has the consequence that a higher hurdle is set for the appellant to overcome. The question is not whether the QP opinion as to the likelihood of prejudice to the provision of advice and/or exchange of views is 'reasonable' (interpreted in the cases as meaning, more or less, permissible), but whether the Cabinet Office can persuade the Tribunal (the burden being upon it to do so) that it was *right* to maintain one or both of the exemptions ultimately relied upon.

27. We have reached the clear conclusion that the Cabinet Office wholly fails to make out the appeal. We can well understand why Mr Worms places reliance on the inconsistent case with which he has been confronted as calling into question the sincerity and plausibility of the appeal but we prefer to focus our attention on the substance of the arguments.

28. Taking this approach, we are struck by the distance between the language of s36(2)(b)(i) and (ii) and the arguments advanced on behalf of the Cabinet Office. The exemptions are designed to guard against prejudice to the effective conduct of public affairs specifically through the *inhibition* of free and frank

provision of advice or the free and frank exchange of views for the purposes of deliberation. What is it about the information under consideration that threatens the provision of free and frank advice or the free and frank exchange of views for the purposes of deliberation? We are told that the purpose of Insight pages is to tell the owner of the Facebook page what topics or areas are of interest to his/her/its audience and what topics are not well received. This information, it is said, then enables ministers and their advisers to have "honest" conversations about their communications strategy and future activity. Why should the publication of this information inhibit such discussions? Why should the "candour" of advice be compromised? We simply fail to see any good reason why it would.

29. We note the standard assertion that unless the exemption is maintained, there will be a 'chilling effect' on discussions between ministers and their advisers. Public bodies advance this admonition with impressive consistency, but time and again it has the look of a stock device rather than an argument of substance. Here we find no factual basis to underpin it. If posts on certain subjects were not well received one would expect relevant advisers to discuss the implications of that experience with relevant ministers. Why should they be inhibited from so doing if the metadata were in the public domain? The obvious answer, it seems to us, is that they would not be. Why would the 'space' in which conversations are held and advice given become 'unsafe' as a result of the requested information being public? Plainly, we think, the forum for these (admittedly confidential) exchanges would be no less secure than it is now.

30. A further problem with the 'chilling effect' argument is that, as Mr Worms points out, the most important data to do with audience reaction to Facebook posts is published anyway.[3] What possible reason is there to think that publication of the smaller detail contained in the metadata requested would add anything to the supposedly inhibitory consequences (not hitherto experienced, it would seem) of the everyday publication of the headline data? We see none.

31. The supposed prejudice becomes all the more obviously illusory when attention is focussed on the temporal scope of the request. We struggle greatly to see how the free and frank provision of advice to ministers and/or exchange of views for the purposes of deliberation now or in the future could be affected by the release into the public domain of metadata derived from a Facebook page for the last quarter of 2017. It is no argument to say that our decision might set a precedent. Any further, wider request would have to be considered on its own merits.

[3] It is common ground that Facebook has always published numbers of 'likes' and, recently, numbers of 'sad' and 'angry' reactions are also published.

32. Finally, we turn to the surprising claim that publication of the information would be likely to inhibit officials from posting on certain topics. The puzzling argument seems to be that officials might nowadays be inclined to post material on subjects which have already been tested and found to be unpopular, but would be disinclined to do so if the metadata were public. Why would officials start with such an inclination? Especially as the metadata would only confirm in fuller detail the public information as to the recorded number of 'likes'? It seems to us obvious that what would inhibit posting on certain topics would be the fact that they were known to be unpopular, not that certain somewhat abstruse metadata relating to them had come into the public domain. We see no merit whatever in the 'inhibition from posting' argument, even if (which is far from clear) it is within the scope of s36(2)(b)(i) or (ii).

33. Since the exemption relied upon is not engaged, the question of the public interest balance does not arise. Had it arisen, we would have unhesitatingly held that, for the reasons already given in paras 27-32, the Cabinet Office had failed entirely to show that the public interest favoured maintaining the exemptions, or either of them.

Disposal

34. For all of these reasons, we conclude that the appeal is without merit and must be dismissed. The disputed information must be disclosed.

Anthony Snelson

Judge of the First-tier Tribunal
Date: 6 September 2019
Promulgation date: 16 September 2019