First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0035

Heard at Field House
On 28th October 2019

Before

JUDGE
MISS FIONA HENDERSON

TRIBUNAL MEMBERS
MR DAVE SIVERS
MR NIGEL WATSON

Between

MS MOLLY SCOTT CATO MEP

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

And
THE DEPARTMENT OF HEALTH AND SOCIAL CARE

2nd Respondent

The Appellant was represented by Mr Brendan Moorhouse of Counsel.
Information Commissioner chose not to be represented
The 2nd Respondent was represented by Mr Eric Metcalfe of Counsel.

DECISION AND REASONS

1. The Appeal is refused for the reasons set out below.

Introduction

2. This is an appeal against Decision Notice FS5070167 dated 17 January 2019 which held that the Department of Health and Social Care (DHSC) was correct neither to confirm nor deny whether it held the disputed information by virtue of the exclusion at s35(3) FOIA as to do so would reveal information on the development or formulation of government policy, and that the public interest in this case supports that decision.

3. Background

The Appellant is an MEP who represents 5 million people in the SW of England. She has an interest in the NHS: as any obstruction to the functioning of the health service, delay in the delivery of drugs or medical equipment or further pressure on staffing levels due to immigration difficulties; will impact on the smooth running of the health service and thus on the many people she represents who depend upon it.

4. On 6th April 2017 an article was published in the Health Service Journal (HSJ)[1] which was headlined:
"*Leak reveals worst case scenario for nursing after Brexit".*
The article relied upon leaked material and referenced modelling they believed had been carried out by Department of Health civil servants, which:
"*forecasts a worst case scenario for the UK where all EU and non-EU inflows of nurses and midwives stop after changes to immigration rules".*
The article reported that if all EU and non-EU inflows stopped this would create a shortage of nurses in the health and care sector of between 26,000 and 42,000 by 2025-26 compared to the forecast base case supply. The Chief executive of the RCN was quoted as saying that the NHS would be unsafe if the number of registered nurses fell by the levels estimated by the modelling. The article further stated that:
"the health minister Philip Dunne has convened a new committee at the DH to drive a policy response to workforce issues. All the national NHS arm's length bodies are represented on the committee.
It is expected the group will look at nursing supply, retention and training, as well as issues affecting other staff groups. Brexit will be discussed but decisions will be made at cabinet and Secretary of state level as negotiations with the EU progress".

Information Request

5. On 31st August 2017 the Appellant wrote to DHSC asking for:
"a copy of the document that analyses the impact of Brexit upon the National Health Service, that was subject to a leak in April.
Please can you also tell me whether this report was commissioned by the Department of Health or the Department for Exiting the EU?"

6. The DHSC refused to confirm or deny if the information was held[2] (relying upon s35(3) FOIA), a position which was upheld following an internal review[3].

[1] P80 bundle. During the hearing the panel asked for a copy of the article that reported the leak. Although the Appellant emailed a copy of an article from the Nursing and Midwifery Times to the tribunal office that was not circulated to the panel during the hearing and was not considered in reaching this decision. A copy of the HSJ article was provided at the hearing by the 2nd Respondent and added to the bundle. The Appellant agreed that this was the original article and the publication to whom the source information had been leaked. It was accepted that other reports recycled the information in the HSJ article
[2] 26.10.17

7. The Appellant complained to the Commissioner on 29th May 2018. Having accepted the case, the Commissioner asked the DHSC to confirm to her whether the information is held, and, if so, to provide a copy of this information for her consideration."[4] The Tribunal has characterised this request as being for the "underlying information[5]". The DHSC responded that they did not believe that the ICO needed to know whether the information was held or not in order to make a decision. Their case was that the arguments should stand up whether the information is held (since to be effective, a NCND must be applied consistently"). The Commissioner agreed that it was not necessary on the facts of this case and agreed to determine the complaint without the underlying information. The Commissioner upheld the NCND.

Appeal

8. The Appellant appealed by notice dated 11th February 2019[6]. In this she did not challenge the engagement of the exemption but advanced public interest arguments which in her view warranted confirmation of whether the information was held or not. She made reference to a subsequent request that she had made in December 2018 and asked that she be provided with the information in both the August and December requests.

9. The Commissioner opposed the appeal and relied upon the decision notice in her response[7]. The DHSC were joined on 6th March 2019, they opposed the appeal. In relation to the request that is the subject of this appeal they reiterated that the Decision Notice did not concern the issue of disclosure but only whether the NCND was lawful. They relied upon the need for a consistent application of their policy of refusing to comment on alleged leaks and maintained that confirming or denying that the information was held would not illuminate public debate to any significant extent.

10. The case was listed for an oral hearing at the request of the Appellant. The Commissioner indicated in her response that she did not propose to be represented in person at any oral hearing, instead being content to rely upon the contents of her decision notice and written representations. Both the Appellant and DHSC submitted skeleton arguments. The Tribunal has had regard to the overriding objective as set out in rule 2 in particular:
    - Resources,
    - Delay
    - Flexibility and
    - Proportionality

    and is satisfied that it was not in the interests of justice to require the Commissioner to attend. The DHSC are present to argue the case opposing the appeal in person. The ICO accepted the DHSC case in her appeal and it would be disproportionate for her to have to attend to repeat the arguments that are being made by DHSC.

---

[3] 23.3.18

[4] P86-7 bundle.

[5] Use of the phrase underlying information encompasses a variety of scenarios and cannot be read as confirming whether there is or is not a source document for the leak. It encompasses the factual situations where:
- there was no leaked document,
- there was a leak but it is inaccurately represented in the article or
- there was a leak and it is accurately represented in the article.

[6] P12

[7] P27 bundle dated 25.02.19

Scope

11. Section 57(1) FOIA provides:

    1) *Where a decision notice has been served[8], the complainant or the public authority may appeal to the Tribunal against the notice*

    Consequently, the Tribunal's jurisdiction is limited to the scope of the Decision Notice under appeal. In this case the Decision Notice arises from a complaint to the Commissioner pursuant to s50 FOIA concerning the August 2018 information request only. As such the December request is outside of the jurisdiction of the Tribunal in this appeal and will not be considered in this decision.

Application to amend the grounds of appeal

12. In the Appellant's skeleton argument of 19th September 2019, Counsel advanced arguments that the exemption was not engaged, this was contrary to the Appellant's grounds of appeal where she had conceded that the requested information related to the formulation of government policy. The Appellant's case now was that the government had already:
    i. published its White paper setting out its policy and approach to leaving the EU in February 2017,
    ii. announced that the UK would be leaving the EU and had submitted the Article 50 notification on 29th March 2017.
    iii. Published the NHS 5 year plan on 31.3.2017.

    The Appellant's case was that the policy in relation to Brexit and the NHS was therefore established and that any source document of the leak could not therefore be "formulation or development" of policy. Despite arguing a ground contrary to the concession made in the grounds of appeal, no application to amend was made either in the skeleton argument or separately prior to the oral hearing.

13. The DHSC argued that in the absence of a formal application to amend it was too late to make it at the hearing and that the Commissioner would be disadvantaged by having decided not to attend based upon a belief that the only issue in dispute was the public interest balance. They conceded that there was no prejudice to them in that their witness had included aspects of policy determination in her witness statement and whilst opposing the amendment of the grounds of appeal, they had nevertheless set out their arguments to counter the additional ground in their skeleton argument of 7th October 2019. They relied upon certainty of the case being argued, and the need to abide by the Tribunal's rules in support of their objection to the amendment.

14. The Tribunal permitted the grounds of appeal to be amended pursuant to rule 5(3)(c) of the *Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* (the Rules) to challenge whether the exemption was engaged. The Tribunal Judge had regard to the overriding objective as set out in rule 2 of the Rules and took into consideration that the Appellant did not have legal advice when the grounds were settled. Although no formal application had been made when it ought to have been:

[8] As provided for by s50 FOIA

- This was a technical fault; by the detailed argument in the skeleton argument the application could be implied.
- The DHSC understood this to be the case that the Appellant sought to argue as evidenced by their inclusion of arguments against it in their own skeleton.

The overriding objective requires the Tribunal to be flexible and to facilitate the parties' participation in the case, allowing the amendment in these circumstances was therefore proportionate and any remedy was therefore possible through mitigation of any prejudice to the other parties.

i. The DHSC accepted that they were not prejudiced were permission given to amend.
ii. The Tribunal was satisfied that the Commissioner was not prejudiced.

- Although the Commissioner was not represented, she had been served with a copy of the skeleton arguments.
- She was therefore on notice that the Appellant was seeking to raise the engagement of the exemption and was aware of the DHSC's arguments arguing to counter the Appellant's arguments.
- The ICO had had the opportunity to provide further written submissions but had chosen not to.

There was no basis therefore for concluding that she was prejudiced by the amendment to the grounds of appeal.

The Evidence

15. The Tribunal has had a regard to the original bundle comprising 80 pages and the skeleton arguments of the Appellant and DHSC as well as the oral arguments advanced at the hearing. There was no copy of the article which referenced the leak in the original bundle. The Tribunal was satisfied that this would be necessary to enable it to determine whether any source document (if it were held by the public authority) would be exempt information because it related to the formulation or development of government policy. A copy of the HSJ document was therefore provided and added to the open bundle (along with an email chain relating to the reasons why the ICO had not seen the underlying information). Included in the open bundle was a witness statement from Ms Victoria Dare, Deputy Director of Workforce Strategy and Clinical Excellence Awards. She was present and available to answer questions at the hearing, but in the event, was not required to do so.

16. The Tribunal also concluded that it needed to know "the underlying information" i.e. whether the information was held and if so to be provided with a copy of it. Whilst the Tribunal agrees with the Commissioner that this is discretionary (in that there may be some cases where it is not necessary to know this) on the facts of this case NCND was acting as a bar to consideration of whether the "underlying information" should be disclosed. The consequence of NCND being maintained was that any source document (if it existed) would never be scrutinised by the Commissioner or the Tribunal and any public interest arguments relating to its disclosure would never be considered. A failure to scrutinise the underlying information on the facts of this case risked the NCND provision being treated as an absolute exemption as the Tribunal would not be able to factor any "smoking gun" apparent from the "underlying information" into the public interest balance of maintaining NCND without this knowledge. The "underlying information" was therefore provided in closed session.

17. As this is a case where the Appellant was not given a gist of what took place in the closed session the Tribunal has provided a short closed annex to reflect the content of the closed session and any conclusions the Tribunal has drawn from this.

The law

18. Section 35 FOIA provides:

(1) Information held by a government department … is exempt information if it relates to—

(a) the formulation or development of government policy,…

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, …

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(4)In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking. …….

Is the Exemption Engaged?

19. The question for the Tribunal requires it to consider the nature of a document that might not exist; as one of the scenarios behind NCND is that there was no leaked document. It was accepted that the wording of s 35(3) requires the Tribunal to consider the theoretical nature of what the information would be if it existed. We are satisfied on the facts of this case that in determining this we should have regard to the HSJ article which reports the "leak" to help us to determine the nature of the leaked document that it purports to quote.

20. The article appeared in the HSJ and is dated 6 April 2017. It was entitled: "*Leak reveals worst case scenario for nursing after Brexit*". Its headlines were that:
    - Modelling by civil servants shows NHS nursing supply could fail to meet demand by 2025-6
    - Worst case scenario shows a shortage of between 26,000 and 42,000 nurses
    - Health minister convenes new committee to drive policy response.

21. The article contained a graph showing Brexit nurse supply modelling over time with representation of scenarios where there were:
    - no EEA inflows,
    - no EEA or Rest of the world inflows and
    - the base case supply,
    - with values for unconstrained demand and planned demand (lower and upper).

22. The article reports that:
"health minister Philip Dunne has convened a new committee at the DH to drive a policy response to workforce issues. All the national NHS arm's length bodies are represented on the committee.
It is expected the group will look at nursing supply, retention and training as well as issues affecting other staff groups. Brexit will be discussed but decisions will be made a cabinet and secretary of state level as negotiations with the EU progress"

23. The Appellant notes that there is no definition of government policy within s84 FOIA. She argues that it should be defined as:
"a course or principle of action adopted or proposed by an organization or individual".
The Tribunal accepts that this is a reasonable definition and adopts it. Her case was that by the date of the request the policy concerned was already decided and as such the information could no longer relate to the formulation or development of government policy. She argues that the exemption is not engaged and in the alternative that the decision having been taken, the majority of the report if it exists is likely to be statistical and is therefore disclosable under s35(2).

24. The Appellant relies upon the facts that by the date of the publication of the article:
i. The Government had announced that the UK of GB and NI would be leaving the EU and they had submitted Article 50 notification on 29th March 2017,
ii. The NHS had already published its 5 year plan,
iii. The House of Commons Health Committee Report had published "Brexit and health and social care people and process on 25.4.17"[9]
She argues that this demonstrates that the policy both in relation to Brexit and the NHS had been fixed and that any source document is likely to be information about the implementation of an established policy. She criticizes the Commissioner's reference to "managing the impact" of Brexit which she argues is administration and not the same as the formulation of development of policy.

25. Whilst it is accepted that certain aspects of overarching policy had been fixed by the date of the leak and the information request (such as triggering article 50), we take into consideration that s35(1) refers to the "development" of policy as well as its formulation. In our judgment this allows for a situation whereby policy or aspects of it need to be responded to, refined, reconsidered or altered. We accept the evidence from Ms Dare that the Brexit negotiations were at an early stage and that issues relating to Brexit were "live". The Appellant has argued that the timing is not material and relies upon the response to her December 2018 request by DHSC as evidence that they apply a blanket policy relating to FOIA requests. We are not satisfied that the December 2018 request is material. Brexit is still not resolved, negotiations are still ongoing as such the Tribunal does not accept that this is evidence of a "blanket policy" rather than a recognition that the situation remains live.

26. The Appellant argues that the Commissioner erred in concluding that "*the government and its departments were still analysing their positions*"[10] It was argued on behalf of the Appellant that Brexit having been triggered the time for developing policy was past as the

[9] Although this was shortly after the date of the leaked article the Tribunal accepts for the purposes of the Appellant's argument that for it to have been issued as a public document by that date, it is likely that its contents had been agreed earlier.

[10] DN para 32

consequential ramifications ought to have been considered already and any decisions now being taken were administering the implementation of an existing policy. The Tribunal considers this to be too broad a brush in defining policy; which does not take into consideration more targeted and specific policies which arise as a consequence. In this regard we prefer the Commissioner's approach, she applied a broad definition of government policy including: government plans to achieve specific outcomes, from high level objectives to detailed proposals. We take into consideration that Brexit negotiations are likely to raise issues that may not have been considered previously and that the government will need to determine a course or principle of action in response. We also take into consideration the impact of cross-departmental considerations such as the immigration policy that will be applied in response to perceived nursing shortfall. We are not satisfied that the evidence suggests that this aspect of policy has been fixed. We rely upon the Article (which purports to be informed by the leaked report if it exists) which suggests that the "source" information is being used to *"drive a policy response to workforce issues."* From the HSJ article this satisfies us that the leaked source document if it exists, is being used to formulate government policy relating to "*nursing supply, retention and training as well as issues affecting other staff groups."*

27. We are satisfied therefore that the requested information, if held, relates to the formulation and development of government policy and that the exemption is engaged.

The public interest test

28. The DHSC maintain that they are exempt from complying with s1(1)(a) FOIA because pursuant to s2(1) FOIA*:*

(b)in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.

The Tribunal is satisfied that the date when it should consider the balance of public interests is at the date of the public authority's refusal.[11]

29. The Tribunal reminds itself that the appeal concerns a refusal to confirm or deny whether the information is held and is not a determination upon whether any underlying information should in fact be disclosed. However, the Appellant argued that we should also consider the public interest in the disclosure of any underlying information when assessing the public interest in whether the NCND should be upheld. In considering this aspect the Tribunal invited the parties to formulate a way that the information could be requested in such a way as not to provoke a NCND response. On the facts of this case (in particular the link to the leak) no such neutral formulation was achieved. Therefore, as set out in paragraph 16 above, we are satisfied that we should consider any public interest arguments applicable to disclosure of the information itself (if it exists) as confirmation that the information is held would be the gateway to consideration of the merits of disclosure by the ICO and the Tribunal. If on review the Tribunal were of the view that the public interest in disclosure outweighed the public interest in withholding the information that would be a weighty factor in favour of overturning the NCND decision.

[11] NHS England v ICO and Dean [2019] UKUT 145 AAC para 13 and All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Foreign and Commonwealth Office [2016] AACR 5

In favour of confirming or denying that the information is held

30. It was agreed between the parties and we accept the public interest in promoting transparency and openness in the way public authorities operate, plan and implement their policy, through the release of information. We further accept that matters concerning the NHS and the UK's exit from the EU remain live and open to debate and scrutiny at the relevant time. The NHS remains at the forefront of the public consciousness as demonstrated by the level of national media coverage it receives on a daily basis. NHS provision affects the general public and poor planning can affect lives. We therefore accept that the subject matter is of high public interest.

31. The Appellant argues that these factors should be taken into consideration when assessing the importance of confirming whether the document is held or not. If held, confirmation will enable analysis of the reported content in the knowledge that it is accurate. If there was no underlying leaked document then there is a clear public interest in refuting the accuracy of the press report. The uncertainty of NCND has created unnecessary anxiety and suspicion around future NHS staffing levels and whether there is appropriate forward planning, which is not in the public interest.

32. The DHSC accept that confirming or denying may confirm whether the document leaked to the press was in fact a genuine document used by the DHSC in relation to their Brexit planning. However, we observe that confirming that there was a source document would not authenticate the figures or the modelling (as they could have been misrepresented from any source document).

33. The majority of the Appellant's arguments related to the public interest in disclosure of the underlying information which could only be achieved if confirmation was given as to whether the "source document" existed or not. She asserts that government ministers have undermined objective information as evidenced by the 39 sectoral studies (not as originally suggested 58 impact studies of "excruciating detail") which were only disclosed as summaries. Summaries left the public and democratic representatives unclear about the evidence against which they can form judgments about Brexit.[12] Summaries are insufficient to enable proper scrutiny of models, as the assumptions upon which they are based are not known, this results in confusion over the evidence base relied upon by the Government in its Brexit planning. We accept that the detailed data upon which a summary is based provides a more thorough opportunity for scrutiny.

34. The Appellant argues that a pillar of a functioning democracy is that data obtained by an independent civil service is made available to elected representatives to make informed decisions when voting on the laws. The Tribunal is not satisfied that this is the situation here as it is not apparent that the information allegedly leaked was relevant to a specific vote (rather than being potentially useful to lobby for or against potential policies). The Tribunal reminds itself that disclosure under FOIA is to the public and not specifically democratic representatives. Additional procedures are in place to enable elected representatives to have access to information that is not otherwise in the public domain both for lobbying purposes and also for votes. The Appellant gave the example of being permitted to read an unredacted Cross-Whitehall briefing by visiting the House of Commons Reading Room. Additionally, we have had regard to mechanisms such as

[12] P54 letter to ICO

"questions in the house," and information provided to select committees which in our judgment provide a route to enable elected representatives to obtain information beyond that which is in the public domain. As such we confine ourselves to disclosure to the public (although we acknowledge that through public dissemination elected representatives would also gain access).

35. The factors that the Tribunal has had regard to when assessing the public interest in disclosure of "the underlying situation" for gateway purposes are the following:
    i. The extent to which transparency, scrutiny, accountability and public participation in the development of public policy would be advanced (as set out in paragraph 30 above) including through the provision of any assumptions, models and raw data,
    ii. Whether there was evidence of a "smoking gun" (such as improper conduct, negligent planning that would put lives at risk, deliberate misrepresentation of information, failure to respond appropriately).
    iii. Whether information in the public domain was misleading and would be corrected by disclosure (and the significance of any misrepresentation).

36. The DHSC argue that these public interests are reduced by the disclosure by the Government on the topic of other information on a continual and updating process. They provided a list of updates[13] however, we observe that these largely post date the relevant date and only two appeared potentially within the scope of the topic of the article in question.[14] We agree with the ICO that the information available at the relevant date did not weaken the public interest in confirming whether or not the requested information is held.[15] It is not apparent to us that the information available was on the same topic or of similar detail to the information purportedly contained within any source document.

37. The tribunal considered the underlying situation in closed session and is satisfied that the public interests in disclosure of the underlying situation are weakened because:
    i. there was no evidence of a "smoking gun" in any material before us[16].
    ii. The fact of a looming shortfall is already in the public domain, the HSJ article quotes the Chief Executive of the RCN as suggesting that the alleged shortfall levels were not a surprise. "*We warned of this years ago...*"
    iii. We are satisfied that the intention was for involvement outside of central government in the development of the policy response. We accept the evidence of Ms Dare that "*DHSC, relevant related bodies and wider Government were gathering evidence to understand the potential impact of leaving the European Union*[17]" This is consistent with the HSJ article that suggested that the national NHS arm's length bodies were to be represented on the committee convened to drive a policy response to workforce issues.

[13] P37 bundle

[14] Brexit operational readiness guidance for the health and care system in England (21.12.18) " and "Commissioners and providers of social care: Brexit planning update (21 December 2018)

[15] DN para 27

[16] Use of the "material before us" does not indicate whether or not there is a source document.

[17] P74

In favour of maintaining the non confirm non deny response.

38. In assessing the factors in favour of NCND we take into consideration that the request is not just for confirmation of the existence or not of a "Brexit document" but requires confirmation or denial of a leak. We are satisfied that this is a significant factor in the assessment of the public interest:
    i. The DHSC have a general policy not to confirm or deny leaked information. NCND is intended as a deterrent as the value of the information is reduced by the uncertainty surrounding its status. The rationale is that if a public authority confirms the information it is considered to substantiate and validate the leaked information. The outcome may encourage the publication of leaked material in future and increase the likelihood that information will be leaked as the prospect that leaks will be substantiated increases their value. The argument is that it is a method of forcing the government's hand to disclose information outside of the normal channels of FOIA and EIR.
    ii. Denial that the information is held would prejudice the established policy of no comment. The policy only works if it is consistently applied. If confirmation is given in some cases but not others it enables inferences to be drawn so that use of NCND in a future case is tantamount to an admission that the information is held.

39. The Appellant contests this formulation, she argues there are no solid grounds to substantiate the proposition that confirmation or denial that this document is held will lead to more leaks in the future. Indeed, she argues that it is the government's restriction upon disclosure of information which was pushing people towards leaking. If, which is not admitted, the government's disclosure policy is prompting leaks, the prospect of validation of a leak in our judgment would be an additional encouragement. The Tribunal agrees with the DHSC's characterisation of the value of a confirmed leak and that this would effectively reward the use of leaks, we are satisfied that this would be expected to increase willingness to publish and to motivate those tempted to leak.

40. The Appellant also does not agree that any further leaks would undeniably be contrary to the public interest; as each would be dealt with on the merits, so that there would be no precedent or pattern. In the Tribunal's view this illustrates the difficulty with the selective application of NCND. In future cases where NCND is not applied, this is indicative of the "low sensitivity" of the underlying information allowing an inference to be drawn in cases where it continues to be relied upon. Additionally, we accept Ms Dare's evidence as to the undermining impact that confirming or denying leaks would have. Her evidence was that pursuant to their Code, Civil Servants *"Must handle information as openly as possible within the legal framework*[18]*"* and must not knowingly mislead Ministers Parliament or others. The Code states they must comply with the law, uphold the administration of justice and not disclose official information without authority. We agree that the framework is set up so that there are clearly defined procedures and processes through which information is considered for release. Leaks are generally, detrimental as they endanger the trust and confidence that is essential for effective government and may not take into consideration the bigger picture. Additionally, we observe that leaked information is likely to be piecemeal, and the public do not know if the information is authoritative, complete or accurate.

[18] P77 bundle

41. The Appellant argues that the need to NCND is not significant in light of the probable information in this case (from the article it would appear to be statistical data, analysis and scenario planning) whereas the need to protect obscurity would be more significant in a case of national security or relating to a "Supergrass".

42. The DHSC do not accept this characterisation. They argue that the information in any source document would be significant because:

    i. Policy making is informed by all relevant information.

    The Tribunal accepts the evidence of Ms Dare that scenarios considered when developing policy can be more extreme than realistic "worst case scenarios". In our judgment this could lead to "scaremongering" which is not in the public interest.

    ii. The purpose of NCND in this case, is to protect the internal deliberative process as it relates to policy making. Public exposure should not deter the government from full candid and proper deliberation of policy formulation and development including the exploration of all options, the keeping of detailed records and the taking of difficult decisions.

    Whilst the Appellant refers to the inevitability of public pressure in light of the importance of the topic, we are satisfied that there is qualitative difference between general pressure and having to address and defend incomplete data, analysis and thought processes. We agree that the purpose of NCND is to protect information which was not yet intended for public comment.

    iii. Confirmation or denial of leaks and the consequential premature disclosure of information prejudices good working relationships, the neutrality of civil servants and ultimately the quality of government.[19] As it risks exposing information prematurely and without context.

    We accept that the Government has been consistent in not prejudicing negotiations with the EU[20] and confirming or denying leaked information is held may create a false impression with the public which would weaken the government's position on Brexit.

Assessing the Balance

43. We have weighed the arguments and evidence as set out above and are satisfied that the balance of the public interest favours maintaining NCND. We are satisfied that the public interest in a consistent application of NCND to material that is said to be leaked outweighs any public interest in validating or refuting the material in the media report including the public interest in the disclosure of any underlying source material (if there was a source document).

Conclusion

44. For the reasons set out above we refuse this appeal.

Signed Fiona Henderson

Judge of the First-tier Tribunal
Date: 11th December 2019
Date Promulgated: 24th December 2019

[19] P49 Annex A to internal review dated 23.3.18
[20] P66 letter dated 27.11.18