First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0214 & 0223V

Before

Judge Stephen Cragg Q.C.

and Tribunal Members

Ms Rosalind Tatam
Mr Dave Sivers

Heard via the Cloud Video Platform on 28/29 September 2021

Between

Home Office (EA.2019.0214)

Benjamin James Lucas (EA.2019.0223)

Appellants

and

Information Commissioner

First Respondent

and

Benjamin James Lucas (EA.2019.0214)

Home Office (EA.2019.0223)

Second Respondents

The Home Office was represented by David Mitchell.

The Commissioner was not represented.

Mr Lucas represented himself.

DECISION AND REASONS

DECISION

1. Mr Lucas's appeal **EA.2019.0223** is dismissed. The Home Office appeal **EA.2019.0214** is allowed.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties represented joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

3. The Tribunal considered an agreed open bundle of evidence comprising 302 pages, a closed bundle and skeleton arguments, and an authorities bundle.

BACKGROUND

4. On 28 April 2017 Mr Lucas made the following request for information under the FOIA, by way of ten separate requests:

> I would like to request copies of all email or written correspondence between government ministers and/or officials of the [Crown Dependencies and Overseas Territories] and government ministers and/or officials at the UK Home Office during the period beginning 1st September 2016 up to and including the 28th April 2017 with reference to the "Criminal Finances Bill".

5. The Crown Dependencies and Overseas Territories (CDOTs) referred to in the individual requests were the Isle of Man, Jersey, Guernsey, Gibraltar, Cayman Islands, British Virgin Islands, Montserrat, Bermuda, Turks and Caicos and Anguilla respectively.

6. The Home Office took almost four months to respond and did so on 23 August 2017. It provided some information within the scope of the requests, namely information relating to the Isle of Man and Bermuda, but refused to provide the remainder.

7. The Home Office cited the exemptions under section 27(1)(a), 27(2) and 27(3) FOIA (international relations). Mr Lucas requested an internal review on 7 November 2017. It was not until 6 July 2018 that the Home Office upheld its original position.

8. Mr Lucas complained to the Commissioner about the Home Office's handling of his request for information. The Commissioner wrote to the Home Office on 6 August 2018 asking it to explain why it considered that section 27 FOIA applied. She also asked the Home Office to provide her with a copy of the withheld information but had to serve a notice under section 51 FOIA before this happened. During the course of the Commissioner's investigation, the Home Office additionally cited section 35(1)(a) FOIA (formulation of government policy) and 40(2) (personal information) FOIA as reasons for withholding the information.

THE LAW

9. Section 27 FOIA provides, insofar as relevant to these appeals:-

> **27.— International relations.**
> (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—
> (a) relations between the United Kingdom and any other State,
> …
> (c) the interests of the United Kingdom abroad, or
> (d) the promotion or protection by the United Kingdom of its interests abroad.
>
> (2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.
>
> (3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

10. S. 27(1) FOIA is a prejudice-based exemption. In considering its application the Tribunal is required to attach appropriate weight to the evidence of the executive concerning the likely prejudice of disclosure.

11. First, the actual harm which the Home Office alleges would, or would be likely to, occur if it disclosed the withheld information needs to be established. Second, the Home Office must be able to demonstrate that some causal relationship exists between the disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the Home Office is met, namely that disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

12. In relation to the lower threshold ('would be likely') the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, this places a stronger evidential burden on the Home Office. The anticipated prejudice must be more likely than not to occur.

13. S.27(2) FOIA, concerning confidential information, is a class-based exemption. In terms of the confidentiality of information obtained from foreign states, similar principles apply as in the case of certificates of public interest immunity.

14. S.27(2) FOIA is to be read in accordance with s.27(3) FOIA, with the effect that it is wider that the common law right of confidence, because it includes a category of information where 'the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held' in confidence..

15. Section 35(1) FOIA, insofar as relevant to these appeals, provides:-

> **35.— Formulation of government policy, etc.**
> (1) Information held by a government department or by the Welsh Government is exempt information if it relates to—
> (a) the formulation or development of government policy…

16. The Commissioner has produced guidance on the application of s35(1)(a) FOIA which includes the following:-

> 33. To be exempt, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.
>
> 34. However, the exemption will not cover information relating purely to the application or implementation of established policy. It will therefore be important to identify where policy formulation or development ends and implementation begins.
> …
> 56. … the policy can be seen as a framework of 'rules' put in place to achieve a particular objective. This framework will set some fundamental details in stone, but will also inevitably leave more detailed decisions for those implementing the plan, thus giving some inbuilt flexibility on how it can be delivered. Any such adjustment or decision that can be made within this inbuilt flexibility – ie without altering the original objectives or rules – is likely to be an implementation decision rather than policy development.

THE DECISION NOTICE

17. The Commissioner produced a decision notice dated 9 April 2019 (FS50688514). The Commissioner noted that the information comprises correspondence dated between January 2017 and April 2017.

18. In relation to the Home Office claim that s35(1)(a) FOIA applied, the Commissioner noted the Home Office position that the withheld correspondence relates to the handling of a government bill and that:-

> Almost by definition, that means that the correspondence relates to the formulation or development of government policy… In terms of the policy development process, the correspondence dates from a period when the Bill was progressing through Parliament. The Bill had its first reading on 13 October 2016 and received Royal Assent on 27 April 2017…. In this case the policy matter is the establishment of registers of beneficial ownership information of companies registered in the CDs and OTs, and other matters covered in what is now the Criminal Finances Act 2017.

19. However, Mr Lucas pointed out to the Commissioner that the Criminal Finances Act received Royal Assent on 27 April 2017 and so that at the time of his request (28 April), the policy was no longer being formulated and had become law. The Commissioner dealt with the application of s35(1)(a) FOIA fairly shortly as follows:-

> 30. It is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged. In accordance with the Tribunal decision in DfES v Information Commissioner & the Evening Standard (EA/2006/006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.

20. On that basis, the Commissioner was satisfied that the exemption was engaged in this case. The Commissioner went on to consider the public interest balance in relation to s35(1)(a) FOIA. One of the factors she took into account was the timing of the request and she said:-

> 51. In the circumstances of this case, the request was made the day after the Bill received royal assent. At the time, therefore, there was a possibility of future development, such as monitoring, reviewing, analysing or recording the effects of the newly enacted policy.
>
> 52. The Commissioner accepts that, while she was not provided with any evidence that the Home Office had planned to undertake any such activity, the possibility could not be ruled out at the time of the request.
>
> 53. Accordingly, she recognised the public interest argument in favour of maintenance of the exemption in order to protect a safe space for an ongoing policy process.
>
> 54. As regards the chilling effect argument, which is concerned with the loss of candour in future discussions, the Commissioner has found that, having reviewed the withheld information, some of it amounts to candid exchanges which were still recent at the time the request was received. She accepts that such information is particularly sensitive and clearly comprises information where the parties involved would not expect their contributions to be disclosed.
>
> 55. In the circumstances, the Commissioner is of the view that disclosure of that information could discourage the CDs and OTs from contributing to future discussions regarding the Criminal Finances Bill and other areas of related policy. That information is described in a confidential annex to this decision notice, a copy of which will be provided to the Home Office only.
>
> 56. However, with respect to the remaining information withheld by virtue of section 35(1), having viewed the information and considered the arguments, the Commissioner is not satisfied that the Home Office has demonstrated that the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.
>
> 57. The Commissioner's decision, therefore, is that the Home Office was not entitled to withhold that information by virtue of section 35.

21. On the basis that not all the withheld information was exempt by applying the s35(1)(a) FOIA exemption, the Commissioner went on to consider the application of s27 FOIA to the rest of the information sought to be withheld. She commented that:-

> 62…section 27(1) focuses on the effects of the disclosure of the information, while section 27(2) relates to the circumstances under which it was obtained and the conditions placed on it by its supplier, and does not relate primarily to the subject of the information or the harm that may result from its disclosure. In the Commissioner's view, such information is confidential for as long as the state, organisation or court expects it to be so held.
>
> 69. In correspondence with the complainant, the Home Office presented joint arguments in respect of both section 27(1)(a) and 27(2). It told the complainant that disclosure of the information:
>
> > "… would be likely to damage relations between the UK and the other states, as the information was provided in confidence, or the circumstances in which it was obtained make it reasonable for the state to expect that it will be so held. Disclosure would be likely to prejudice the implementation of existing arrangements on the sharing of beneficial ownership information and negatively impact on law enforcement's ability to investigate financial crime".

22. The Home Office considered that that disclosure might also affect the UK's wider policy in this area and prejudice the outcome of the UK's efforts to further promote and enhance corporate transparency and integrity. In correspondence with the Commissioner, the Home Office had said:-

> "The UK Government respects the autonomy of the CDs and OTs and the constitutional relationship between us. It is therefore right that we continue to work consensually and collaboratively with each jurisdiction, and to withhold any information which they might provide, or be reasonably expected to have provided, in confidence".
>
> "…We consider that it is entirely reasonable for the CDs and OTs to expect that correspondence in which their candid views on the handling of a government bill were sought and were provided would be held in confidence, because that is the basis on which any information in the correspondence would have been provided…".

70. Furthermore, it considered that disclosure might also affect the UK's wider policy in this area and prejudice the outcome of the UK's efforts to further promote and enhance corporate transparency and integrity.

71. In correspondence with the Commissioner, the Home Office said:

> "The UK Government respects the autonomy of the CDs and OTs and the constitutional relationship between us. It is therefore right that we continue to work consensually and collaboratively with each jurisdiction, and to withhold any information which they might provide, or be reasonably expected to have provided, in confidence".

72. It also told the Commissioner:

> "…We consider that it is entirely reasonable for the CDs and OTs to expect that correspondence in which their candid views on the handling of a government bill were sought and were provided would be held in confidence, because that is the basis on which any information in the correspondence would have been provided…".

23. In relation to s27(2) FOIA the Commissioner found that:-

77. In this case, the Home Office has not provided any evidence that there is a formal confidentiality agreement or that it has consulted with the CDs and OTs on this matter. Nor has it demonstrated that it has taken legal advice regarding a duty of confidence.

78. In the absence of such evidence, and having considered the content of the withheld information, the Commissioner is not satisfied that the exemption at section 27(2) is engaged.

24. In relation to s27(1)(a) FOIA, the Commissioner found that:-

82…. the potential prejudice described by the Home Office clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.

83. …the Home Office has demonstrated that there is a causal link between disclosure of this information and prejudice occurring to the UK's relations with the CDs and OTs.

84. …the resultant prejudice would be real and of substance. Moreover, the Commissioner is satisfied that there is a more than hypothetical risk of prejudice occurring and therefore the third criterion is met.

25. Therefore, the Commissioner found that the exemption was engaged in relation to the remaining information withheld by virtue of section 27(1)(a) FOIA. In relation to the public interest test, the conclusion was that:-

> 98. In the circumstances of this case, the public interest in maintaining the exemption is that in avoiding prejudice to international relations, in this case with respect to the CDs and OTs. The relevant considerations in reaching a judgement on the balance of the public interest therefore extend beyond the actual content of the withheld information itself.
>
> 98. In the Commissioner's view, it is clearly in the public interest that the UK maintains good international relations. In that respect she recognises the importance of good relations between the UK and the CDs and OTs.
>
> 99. However, in the circumstances of this case, having considered the arguments put forward by both parties, and assessed their relative weight, she is not satisfied that the Home Office has demonstrated that the public interest in maintaining the exemption outweighs the public interest in disclosure.
>
> 100. The Commissioner has concluded that, notwithstanding the timing of the request in relation to the age of the information and the harm that may be caused, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

THE APPEALS

26. The Home Office appeal argued in relation to s35 FOIA that policy formulation and development process did not end with the enactment of the Criminal Finances Act 2017 (CFA 2017) on 27 April 2017. Section 51 of the Sanctions and Anti-Money Laundering Act 2018 (Public registers of beneficial ownership of companies registered in British Overseas Territories) (SAMLA 2018), which is not yet in force, remained a subject of policy formulation and development beyond 27 April 2017 and to the present, with a view to public registers being introduced, by consent, by the end of 2023.

27. The Home Office argued that whilst the CFA 2017 was on the statute book, the policy underpinning s.9 of the Act (which concerned exchange of information between UK and OT law enforcement agencies regarding the beneficial ownership

of companies incorporated in their jurisdictions) was continuing. The continuing formulation of the policy was reflected by s.51 SAMLA 2018 which stated that:

> 51 Public registers of beneficial ownership of companies registered in British Overseas Territories
>
> (1) For the purposes of the detection, investigation or prevention of money laundering, the Secretary of State must provide all reasonable assistance to the governments of the British Overseas Territories to enable each of those governments to establish a publicly accessible register of the beneficial ownership of companies registered in each government's jurisdiction.

28. In relation to s27(2) FOIA the Home Office argued that the Commissioner erred by failing to take into account section 27(3) FOIA which defines the ambit of s.27(2) confidential information. Thus s27(3) FOIA did not require the Home Office to enter into, or evidence, a confidentiality agreement, nor to obtain and then evidence, legal advice.

29. Mr Lucas's appeal argued that even if s27 FOIA applied then, as the Commissioner had found, the public interest was in favour of disclosure. He also argued that the exemption under s35(1) FOIA was not engaged, and in any event the public interest favoured disclosure.

30. To support its case, the Home Office relied upon the witness statement of Mr Pile who is the Deputy Director of the Overseas Territories Directorate at the Foreign and Commonwealth Office and who oversees the implementation of section 51 of the Sanctions and Anti-Money Laundering Act 2018. Mr Pile produced an OPEN and CLOSED version of his witness statement. The witness statement emphasised the sensitive nature of the correspondence the UK and the CDOTs during a period of constitutional sensitivity, as financial services had been devolved to the CDOT governments in most cases, but that the UK has unlimited, but rarely exercised powers to legislate for the CDOTs. He said that the UK is expected to exercise an automatic duty of confidence in its communications with non-UK governments in line with UK government policy on the keeping of such information, referred to as information assets. This is set out in the Cabinet Office guidance on security classifications of information assets. It was pointed out that most of the UK Government's emails were marked "Official" and emails from the Cayman Islands were stated to be "confidential" on their face.

31. Mr Pile also argued that the UK was and is engaged in policy development and formulation in relation to each of the CDOTs towards the voluntary introduction of public registers by the end of 2023.

THE HEARING

32. By the time of the hearing, and since the Commissioner's decision notice, the Home Office had decided that further information could be disclosed. Therefore, the Tribunal had a schedule of eight pieces of communication between the UK government and the OTs, parts of which the Home Office contended should be withheld from Mr Lucas once s35 FOIA and/or s27 FOIA was applied, but which the Commissioner was still of the view should be disclosed.

33. We also had to decide on a number of additional redactions which the Commissioner had found were correctly applied pursuant to s35 FOIA (as set out in the confidential annex to her decision notice), and which form the subject matter of Mr Lucas' appeal.

34. The Home Office was represented by Mr Mitchell and Mr Lucas represented himself.

35. Mr Pile gave evidence in both OPEN and CLOSED sessions. His main points in OPEN (and enlarged upon in CLOSED) were that, (a) at the time of the request, the policy of implementation for the public registers was still underway even though the 2017 Act had been passed and so section 35 FOIA applied; (b) the sensitivity of the correspondence on a delicate constitutional issue for the OTs meant that s27 FOIA was engaged; and (c) the information was confidential for the purposes of s27(2) FOIA. Mr Mitchell emphasised these points in his submissions.

36. At the end of the CLOSED session (which included both evidence and submissions), the following 'gist' was provided to Mr Lucas and read out in court:-

Mr Pile's evidence

1. Witness asked by the Tribunal about his evidence in OPEN concerning the policies of the UK government and OTs and whether the policy considerations were to do with the latter not the former? Witness disagreed,

stating that the Order in Council set out the minimum standard to be met by the OTs and that there could not be a "one size fits all" because the OTs varied from small, poor states such as the Pitcairn Islands to larger, wealthy states such as the Cayman Islands.

2. Witness went through each item of disputed information as listed on page 59 onwards of Open Bundle (with the addition of one redacted passage in item 6 (first part of second para of email 7 April 2017)) explaining how the exemptions at sections 35(1)(a), 27(1) and / or 27(2) applied.

3. In respect of s.35, the witness explained its application to information concerning the passage of the Criminal Finances Bill through the House of Lords and how the OTs sought to engage with peers given the OTs are not represented in the UK Parliament.

4. Witness emphasised the expectation of confidence on the part of the OTs given the subject matter of the correspondence (which was private and confidential) and it being marked "official" and "confidential". This expectation was reinforced by the fact that the OTs did not all have equivalent legislation to FOIA.

5. Witness repeatedly emphasised the sensitivity of the relationship between the UK government and OTs. Witness explained the difficulty with one OT concerning a disagreement over responsibility for financial services. Witness further stated that a legal action had been commenced against the UK Government in the courts of the BVI.

6. Witness agreed with a question put to him by the Tribunal to the effect that generally, s.27 was a "better fit" for the disputed information than s.35.

Home Offices CLOSED submissions

7. By reference to the disputed information (both in terms of that which the Home Office sought to exempt and that which the Commissioner agreed was exempt) the Home Office made submissions regarding the application of sections 27 and 35 based on the CLOSED evidence.

37. Mr Lucas' submissions on s35 FOIA were that in this case the information does not relate to the formulation of policy, and even if it does then the public interest favours disclosure.

38. Developing this point, he argued that there was no policy formulation or development following the passing of the CFA 2017 in August 2017 up until the time that an amendment was proposed and introduced into the SAMLA 2018.

39. The timeline for this is that the CFA 2017 received royal assent on 27 April 2017, Mr Lucas made his request on 28 April 2017 and the relevant amendment to the SAMLA 2018 was first introduced on 30 November 2018 in the Lords. Mr Lucas

points out that the government opposed the amendment up until the vote which included it into SAMLA 2018 and therefore could not be said to be developing or formulating policy around the amendment during the passage of the Bill through Parliament. In any event, he argues that anything that the Home Office has done has related to policy implementation (persuading and working with the CDOTs to accept the policy that has crystallised). He points out that Mr Pile's witness statement says:-

> Releasing confidential correspondence between the two groups at this time will make it much harder to implement the policy, as stipulated by Parliament in the Sanctions and Anti-Money Laundering Act.

40. In relation to s27 FOIA, Mr Lucas argued that disclosure will not prejudice relations between the UK and the OTs. In essence he said that disclosing information which shows that the OTs are opposed to public registers would not disclose anything that is not already known, and which was confirmed in Mr Pile's witness statement.

41. In any event he argued that it was strongly in the public interest to prove that what the UK government said in private matches what it said in public (that it supports public registers), because it was known that the UK government did not support Parliament's legislation for public registers. He also argued that communications from the OTs should not be seen as diplomatic communications given the UK power to legislate for the OTs, and rather the communications should be seen as lobbying the UK government in a bid to shape legislation which should be made public as a matter of principle.

42. Mr Lucas also supported the Commissioner's conclusion that s27(2) FOIA did not apply in this case.

DISCUSSION

43. Having had the opportunity to consider the redacted communications, heard evidence in OPEN and CLOSED from Mr Pile, and submissions from the Home Office and Mr Lucas, the view of the Tribunal is that the exemptions in 27 FOIA can be applied to all the information we have to consider.

44. We accept the evidence of Mr Pile that the proposals for and passing of legislation by the UK Parliament which required the CDOTs to introduce public registers of beneficial ownership, caused consternation and concern for the CDOTs. Financial services constitute an issue which has been devolved to the CDOTs and, whether public registers are to be encouraged or not, the passing of UK legislation on this issue, not surprisingly, was seen as UK 'constitutional overreach' by the CDOTs, and led to a good deal of correspondence between the UK government and the CDOTs as to how to address the issue while retaining confidence and trust between the UK and the CDOTs.

45. We accept the evidence of Mr Pile that this was an extremely difficult and sensitive task, which has led to agreements for CDOTs to voluntarily introduce public registers by the end of 2023, and thus without the need to use an Order in Council that would have required the introduction of the public register legislation. Mr Pile described it as a 'near miracle' that such agreements had been reached in circumstances where the unusual constitutional arrangements between the UK and the CDOTs were placed under great pressure.

46. Applying s27(1)(a) FOIA in these circumstances appears to us to be a straightforward matter. Disclosure of the information we have considered, which includes frank conversations between the UK and CDOTs on the matters (including constitutional matters) raised by the public register issue, would be very likely indeed to prejudice relations between the UK and the CDOTs.

47. In our view the CDOTs would have had an expectation that there would be confidential communication over constitutional issues with the UK, and that these would not be disclosed. Disclosure would be likely to cause a deterioration of relations between the UK and the CDOTs. The likelihood of such a deterioration would also prejudice the interests of the UK abroad (for the purposes of s27(1)(c) FOIA), and prejudice the promotion of the UK's interests abroad (for the purposes of s27(1)(d)).

48. We also accept the argument of the Home Office that s27(2) FOIA applies to the correspondence from the CDOTs to the UK (which is the majority of the information we have considered) and it is confidential information. We accept the Home Office submission that in considering this matter, the Commissioner failed to address the applicability of s27(3) FOIA. The fact that there was no

confidentiality agreement between the UK and the CDOTs is certainly not determinative as to whether information can be considered as confidential or not. The second part of s27(3) FOIA also refers to information where it is reasonable for a State to expect it to be held confidentially in the circumstances.

49. It seems to us that it was reasonable for the UK to consider the withheld information in the emails as confidential in circumstances where it had been sent by the CDOTs with markings clearly expressing that the contents were confidential.

50. In relation to the public interest and s27 FOIA the Commissioner said that it is clearly in the public interest that the UK maintains good international relations. In that respect she recognised the importance of good relations between the UK and the OTs. However, she was not satisfied that the Home Office had demonstrated that the public interest in maintaining the exemption outweighs the public interest in disclosure.

51. The Commissioner described Mr Lucas's arguments in favour of disclosure including:-

    (a) serious questions that had been raised about the UK's relationship with the CDOTs that have allegedly allowed UK or international companies and wealthy UK individuals to avoid UK taxes.
    (b) that the public has the right to know more about the Government's relationships with the CDOTs and the way it interacts with them
    (c) that it was in the public interest to know what the CDOTs said to the UK government 'during a period in which the UK government considered implementing legislative change' and what role, if any, the CDOTs had in the law making process.

52. These were the factors (then summarised in paragraph 95 of the decision notice as set out above) which appear to have convinced the Commissioner that the public interest in disclosure outweighed the public interest in withholding the information.

53. We disagree with this assessment by the Commissioner. Having heard and read the evidence of Mr Pile (which the Commissioner had not), it seems to us that there was a real crisis in the relationship between the UK and the CDOTs, that this resonated on a constitutional level, and that this is reflected in the withheld

correspondence. In our view the ability of the CDOTs and the UK government to conduct confidential communications was of prime importance in retaining the confidence of the CDOTs and enabling the UK government in guiding the CDOTs towards a solution of introducing voluntary public registers, and this outweighs the obvious public interest in disclosing the withheld correspondence.

54. Having reached that conclusion in relation to all the information that has not been disclosed to the Appellant, it is not strictly necessary for the Tribunal to go on to consider the application of s35 FOIA. However, given the fact that it was the main exemption relied upon by the Commissioner and we disagree with her conclusions we should say why.

55. Whether the information relates to the formulation or development of a policy, rather than its implementation is question of fact which must be decided in the light of all the circumstances: D*fES v IC and Evening Standard* [2007] UKIT EA/2006/0006 at paragraph 75(v). Simply put, having considered the written and oral evidence, and applying paragraph 56 of the Commissioner's guidance (see above), we accept Mr Lucas's submissions that the withheld information relates to the implementation of policy rather than to its formulation or development. At the time that Mr Lucas made his request, the CFA 2017 had become law and the government was not developing policy further. The request was for information from the period prior to the grant of royal assent of CFA 2017, and our view is that government policy was not being developed during the passage of the Bill, because, the amendment included was resisted by the UK Government. In relation to what became the amendment to SAMLA 2018, at the time of the request there was no further development of the policy envisagaed because, as Mr Lucas says, the government opposed that amendment also and did not want it to pass.

56. It also seems to us fair to assess the ongoing negotiations with the CDOTs about introducing public registers as the implementation of what had become the policy that such registers should be created. The fact that there were different negotiations with each OT does not, in our view, take away from the fact that the policy was being implemented rather than formulated and developed, and that the withheld information to which the exemption applies relates to the implementation of policy.

We are fortified in these conclusions by Mr Pile's acceptance in evidence (see above) that s27 FOIA was the a 'better fit' for the Home Office's case than is s35 FOIA.

57. On that basis it is our conclusion that the exemption in s35(1) FOIA is not available to the Home Office in this case.

58. The outcome of this discussion is that, in relation to the information which has not been disclosed, we must dismiss Mr Lucas's appeal, but allow that of the Home Office.

STEPHEN CRAGG QC

(Judge of the First-tier Tribunal)

Date of Decision: 19 October 2021.

Date Promulgated: 22 October 2021.