



NCN: [2023] UKFTT 00673 (GRC)
Case Reference: EA/2022/0317

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

Decided without a hearing

**On: 3 August 2023
Decision given on: 15 August 2023**

Before

**TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER STEPHEN SHAW
TRIBUNAL MEMBER ROSALIIND TATAM**

Between

CENTRE FOR ANIMALS AND SOCIAL JUSTICE

Appellant

and

**(1) INFORMATION COMMISSIONER
(2) DEPARTMENT FOR ENVIRONMENT, FOOD & RURAL AFFAIRS ((DEFRA)**

Respondents

Decision: The appeal is Dismissed

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 22 September 2022 (IC-128114-K9L4, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information about specific meetings of the Animal Welfare Committee requested from the Department for Environment, Food & Rural Affairs (“DEFRA”).

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 21 January 2021, the Appellant wrote to DEFRA and requested the following information (the “Request”):

“I am requesting...further information regarding the following items recorded in the summary reports of the two 2020 meetings:

“The Rt Hon the Lord Goldsmith of Richmond Park joined the meeting and invited members to identify their 2-3 top animal welfare issues to inform policy planning

“There was a discussion around how the UK’s animal welfare standards compare to others on the global stage

“There was a discussion around animal sentience and how government might recognise animals as sentient in their policy making”

“I would also be very grateful if you were able to provide further information regarding the frequency of AWC meetings, the AWC budget, and the reasoning behind the AWC remit including wild animals kept by humans rather than wild animals per se?”

4. DEFRA responded on 18 February 2021 and initially refused to provide the requested information. On internal review DEFRA provided some information but relied on various exemptions.

5. The Appellant complained to the Commissioner on 8 September 2021. The Commissioner’s investigation resulted in DEFRA disclosing further information. They withheld only (a) the names of junior staff members, and (b) one small section of one of the documents under section 27(1)(a) and (b) FOIA (prejudice to international relations).

6. The Appellant disputed the application of section 27 and asked the Commissioner to issue a decision notice. The Commissioner decided:

- a. Section 27(1)(a) FOIA is engaged, as assessed at the date of the refusal notice. It was more likely than not that the UK’s ability to negotiate trade deals (and thereby retain good relationships) with other nations would be harmed by disclosure of this information.
- b. The balance of the public interest favours maintaining the exemption. Although there is a strong public interest in ensuring UK standards for animal welfare, this can be met by the existing process of scrutiny that is available for all trade deals. Disclosure of this information would be unlikely to improve animal welfare standards whilst simultaneously harming the UK’s ability to negotiate favourable terms.

The Appeal and Responses

7. The Appellant appealed on 19 October 2022 in relation to the wording withheld under section 27 FOIA (the “disputed information”). The grounds of appeal in summary are:

- a. There is no causal link between disclosure and the likelihood of harm.
- b. There is no factual basis that suggests any prejudice would be likely to occur.
- c. The public interest should fall strongly in favour of disclosure.

8. The Commissioner's response maintains that the Decision Notice was correct. The Appellant submitted a reply which answers points made in the Commissioner's response. We address their arguments in the discussion below.

9. DEFRA was joined as a party to the proceedings but has not submitted a response to the appeal.

Applicable law

10. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

(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.

.....

2 Effect of the exemptions in Part II.

.....

(3) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that -

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

.....

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,
- (b) relations between the United Kingdom and any international organisation or international court...

.....

58 Determination of appeals

(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.

11. The approach to be taken in prejudice cases was set out in the First Tier Tribunal decision of **Hogan v Information Commissioner** [2011] 1 Info LR 588, as approved by the Court of Appeal in **Department for Work and Pensions v Information Commissioner** [2017] 1 WLR 1:

- a. Firstly the applicable interests within the relevant exemption must be identified.

- b. Secondly the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is “real, actual or of substance”.
- c. Thirdly, the likelihood of occurrence of prejudice must be considered. The degree of risk must be such that there is a “real and significant risk” of prejudice, or there “may very well” be prejudice, even if this falls short of being more probable than not.

12. Section 27 FOIA is a qualified exemption, which means that it only applies if in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

13. In *Montague v Information Commissioner & Department for International Trade* [2022] UKUT 104 (AAC) the Upper Tribunal decided that the balance of public interest should be considered at the point when a public authority first responds to a request under FOIA. Although this case dealt with the public interest test, by analogy the same approach should apply to assessing the probability of prejudice.

Issues and evidence

14. The issue is whether DEFRA was entitled to rely on section 27(1)(a) and (b) FOIA to withhold the disputed information. The specific issues are:

- a. What are the applicable interests within the exemption?
- b. Is there a causal link between the disclosure and the prejudice?
- c. Is the prejudice real, actual or of substance?
- d. What is the likelihood of the occurrence of the prejudice?
- e. Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

15. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A closed bundle of documents containing the disputed information and redacted versions of some correspondence from DEFRA to the Commissioner which is included in the open bundle.

Discussion and Conclusions

14. In accordance with section 58 FOIA, our role is to consider whether the Commissioner’s Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

15. The disputed information is the redacted part of the following paragraph: *“MC provided an update on welfare in trade issues. Conversations are ongoing with Australia and the US [REDACTED] There is a focus on what listed status we receive.”*

16. The Commissioner relied only on section 27(1)(a) (relations with other states). We note that DEFRA also relied on section 27(1)(b) (relations with any international organisation). We find that

both exemptions could apply. The redacted paragraph references trade deals with two specific states, and DEFRA argues that deals with other states would also be affected by disclosure. If DEFRA's argument is correct, this would potentially prejudice relations between the UK and other states by affecting the ability to negotiate trade deals and so maintain good trading relationships. DEFRA has also referred to trade agreements with international organisations, which would potentially be affected in the same way.

17. ***What are the applicable interests within the exemption?*** The applicable interests are the UK's ability to conduct effective international relations - in this case, by negotiating favourable trade deals and entering into international trade partnerships with other nations, and also potentially with other international trade organisations.

18. ***Is there a causal link between the disclosure and the prejudice?*** The Appellant says there is not. He says that the UK publicly took the position that it was not prepared to dilute animal welfare standards post Brexit. He references a 2017 statement by the then Secretary of State for Environment, Food and Rural Affairs, a government commitment in 2021 in a BBC article, a document giving the UK's strategic approach for the UK-Australia free trade agreement, the 2019 Conservative manifesto, and a February 2021 statement by the then Secretary of State for International Trade. The Appellant argues that there can be no causal link between disclosure and prejudice to relations, especially with Australia and the US, because the UK's position was already widely known. Alternatively, if the UK had changed its position and was willing to dilute standards, this would not cause prejudice to relations with Australia and the US as they were part of the conversations and would know the situation. It would not cause prejudice to relations with third countries as it would be welcome news and the information could be presumed from reading previous trade deals. The information relates to conversations not decisions, and it would not be surprising to any experienced trade negotiator that animal welfare positions would be discussed and everything is on the table.

19. The Commissioner says that much of the public information relied on by the Appellant predates the Request on 18 February 2021, and existing trade deals were not published until November 2022. The Commissioner says that the disputed information is an official comment by an official of DEFRA Animal Welfare in respect of ongoing conversations with Australia and the UK in the specific context of those ongoing trade negotiations. This is different information from the final published trade agreements. The Commissioner says that DEFRA's submissions during the investigation counter the Appellant's arguments, and he was correct to accept these submissions at face value. If the information revealed the UK was prepared to accept lower animal welfare standards, other states could use this as a starting point in negotiations. The Commissioner says that disclosure of the disputed information would harm the UK's ability to get the best possible terms in these and future deals, and could be used as leverage to make early concessions. He argues that speculation on the UK's likely negotiating position based on previous public statements is very different from disclosing the summary content of ongoing conversations.

20. The Appellant's reply to the Commissioner's response was dated 5 January 2023, after publication of the Australia trade deal. He argues that there can be no current causal link because negotiations have been underway for a significant period of time, and the extent to which the UK is willing to import animal products from countries with lower welfare standards is widely known following the Australian trade agreement.

21. The Appellant also says that the Commissioner's assessment of prejudice contradicts its previous position in the Decision Notice, where he suggested DEFRA should simply disclose the

remaining information. The Commissioner replies that he made it clear that he would have upheld the exemptions on the basis of circumstances at the time of the reply to the Request. Having considered the wording of the Decision Notice, it is clear to us that the Commissioner was applying the tests at the time of the reply to the Request. He did not order DEFRA to disclose more information because the position had changed. Instead, this was proposed as a possible pragmatic solution because circumstances had changed, meaning that the public interest would now be tilted towards disclosure. This Tribunal is also considering both the prejudice and the public interest tests at the time of DEFRA's first response to the Request, as we are required to do by *Montague*.

22. Having considered the arguments on both sides, we find that there is a clear causal link between the disclosure and the prejudice. We have considered this at the time when DEFRA first responded to the Request. At that point in time, the UK was still negotiating with both Australia and the US. The disputed information provides a snapshot of the position in relation to animal welfare standards in important trade deals at that point in time. Disclosure would also give other countries or organisations prior knowledge of the UK's stance, and so means that the UK would be less able to obtain concessions on other issues during the negotiation process.

23. We do not agree with the Appellant that the previous public statements made by the government prevent there from being this causal link between the disclosure and the prejudice. Were publication of the disputed information to reveal a different UK approach, this could mean that the change could not be used to secure other concessions during negotiations. Were it to reveal the same approach, it would still give away the UK's likely position and so be useful information for those negotiating with the UK. In both cases there is potential damage to the UK's ability to obtain the best deal. There is a big difference between expecting certain animal welfare issues to be covered in negotiations, and knowing the UK's position at a particular point in two specific trade deals. It makes no difference to our decision that a final trade deal was published later. Firstly, it was not published by the time of the response to the Request. Secondly, this publication only reveals the final position, not what was being discussed as an option during the trade negotiations themselves.

24. ***Is the prejudice real, actual or of substance?*** We find that the prejudice relied on by DEFRA is real, actual or of substance. Again, we have considered this at the time when DEFRA first responded to the Request. Having seen the closed information, we are satisfied that it reveals a specific approach to animal welfare issues in specific trade deals. If disclosure of this information affected the effectiveness of other trade negotiations, this would be of significant prejudice to the UK at a time when it was attempting to negotiate the best possible trade deals with a number of different countries and organisations.

25. ***What is the likelihood of the occurrence of the prejudice?*** The Appellant disputes that prejudice is likely to occur on a number of grounds. He points again to the UK having already adopted a public trade position. He says that the tone of the minutes is tempered and professional, making it highly unlikely that the tone suddenly shifts in one short sentence to reveal something damaging to an international trading relationship, and it is also unlikely that a short sentence said in this context would cause any real harm. He also says it is unlikely that positions were not known at that time or shortly after.

26. The Commissioner says that it is the content rather than the length of the disputed information that is important, and a few words could be highly prejudicial. He maintains that it is more likely than not that the UK's ability to negotiate trade deals (and thereby retain good relationships) with other states and organisations would be harmed by disclosure.

27. Having considered the arguments alongside the documents, we find that disclosure would prejudice relations between the UK and other states that it was negotiating or wished to negotiate trade deals with, and similarly between the UK and international trade organisations. We are persuaded on the balance of probabilities that this would occur. Again, we have considered this at the time when DEFRA first responded to the Request. This timing is important to our decision, and is a key part of the reason why we have decided that prejudice would occur. Revealing conversations about a negotiating position at a point where negotiations are still ongoing would, in our view, self-evidently affect the UK's position in those negotiations, and in other ongoing or anticipated trade negotiations involving animal welfare issues.

28. We have particularly taken into account the following information from the letter from DEFRA to the Commissioner of 1 September 2022, sent during the Commissioner's investigation:

The disclosure of this information signals a contentious trade stance which could impact our ability to open up international trade with any future partners (not just the US or Australia) or could be used against us as leverage to make early concessions. At the very least it would show our hand before we are able to purposefully explain over time what the policy position is in full, how it would work and most importantly take away our ability to leverage the strategic release of information in order to extract concessions at the right time. To secure any measure, it is necessary for the UK to keep policy positions undisclosed in order to implement a negotiating strategy which allows trade-offs to be made.

Furthermore, this policy has not been reflected in the UK-Australia FTA text. The disclosure of this information would undermine our negotiating strategy as it would indicate to trading partners how far the UK was pushed back from its negotiating positions in the Australia process, from which other countries might draw inferences about how far the UK can be pushed in negotiations. Knowing what the UK will accept is different to knowing how far the UK will fall-back. With regards to the US, there remains the possibility of further FTA negotiations and to disclose information that could allow the US to draw inferences about our potential approach to and stance in such negotiations in advance would be tactically detrimental and could lead to a worse outcome for our national interests.

Forewarning any future trading partner of UK positions or revealing internal considerations that could be used by negotiations partners to undermine the UK's position, would both be expected to reduce the ability of UK negotiators to achieve strong outcomes on animal welfare in the UK public interest.

29. We have dealt above with the Appellant's point that the UK had already adopted a public position. This does not prevent disclosure of any revised position adopted at a certain point of specific trade negotiations from having a prejudicial effect on those or other negotiations. In relation to the tone, length and context of the disputed information, DEFRA describes this as a "contentious trade stance". We have seen the relevant words and have no reason to doubt DEFRA's description. We also accept DEFRA's account of what was reflected in the UK-Australia text, and the point that had been reached in negotiations with the US. We do not agree with the Appellant that the UK's position was already known or about to be known in the Australia and UK negotiations. In addition, even if that was the case, disclosure at that point in time would affect other negotiations with other states or international organisations.

30. ***Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?*** The Appellant argues that disclosure would be in the public interest.

He says that the government has made great play of its intention, post-Brexit, to maintain and enhance what it describes as the UK's high animal welfare standards through trade arrangements. In this context, the public is entitled to know how the government (and its advisory committee) intends to pursue this or whether they have changed their position. If the government has changed its position or misled the public, the UK public should be entitled to question why the Government either lied to them or changed its position without being informed, consulted or debated. There is also huge interest in and concern about animal welfare, particularly in relation to diluting standards through trade deals.

31. The Commissioner acknowledges there is a strong public interest in ensuring that the terms for protecting animal welfare are consistent with the standards that the UK already sets. However, there are protections already in place – media scrutiny of proposed trade deals, politicians being accountable to the public for their decisions, and the ability of Parliament to intervene to secure adequate protection for animal welfare in trade deals.

32. Having balanced the interests in this case, we find that the public interest in maintaining the exemption does outweigh the public interest in disclosing the information.

33. We agree that the issue of animal welfare standards in the context of international trade deals is an issue of significant public interest. The trade negotiations were taking place after the government had made public statements about their position following Brexit. There is undoubtedly public interest in transparency about how negotiating positions on this issue are discussed and reached. This is particularly the case if the outcome does not fit with the government's previously announced position, or if animal welfare standards are diluted during negotiations.

34. However, this public interest in transparency needs to be balanced against the prejudice to trade negotiations that would be caused by disclosure. Again, the timing is important. The Appellant is asking for disclosure of a summary of a conversation about animal welfare in trade deals at a time when negotiations were still happening. He is asking for information that would allow the public to scrutinise and hold the negotiators to account during the negotiations themselves. This would clearly cause significant damage to the UK's position in trade negotiations. It would not only reveal the UK's position, but undermine the whole process if the negotiators could be challenged by the public during the actual negotiations.

35. As pointed out by the Commissioner, there are other methods of scrutiny. The Appellant says in his reply that there is no requirement for a vote or debate on trade deals, and MP accountability is not an effective safeguard. It is correct that these come later in the process after a trade deal has been reached. Nevertheless, this goes some way towards the public interest in questioning what the government has done and why. Trade deals are subject to a check by Parliament to ensure they comply with the law. Once a trade deal is published, the media and public can scrutinise and question the position taken on animal welfare. We also note the point made by DEFRA that an undermining of the UK's negotiating position may actually damage its ability to achieve strong outcomes in relation to animal welfare, which would damage the public interest. For example, if animal welfare standards were to be diluted in a particular trade deal, advance knowledge of this would undermine the UK's ability to negotiate higher standards in other trade deals that were under discussion at the same time.

36. We therefore find that the public interest in disclosure is met to some extent by other methods of scrutiny, and the prejudice caused by disclosure at the time of the response to the Request is significant enough to mean the public interest is in favour of maintaining the exemption.

37. We find that DEFRA was entitled to rely on sections 27(1)(a) and 27(1)(b) to withhold the disputed information and we dismiss the appeal for the reasons explained above.

Signed *Judge Hazel Oliver*

Date: 11 August 2023