



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notices: FS50790211, 50793871**

Appeal Reference: EA/2019/0109 & 0111

**Heard at Field House
On 11 November 2019**

Before

JUDGE CHRIS HUGHES

ROSALIND TATAM & ANDREW WHETNALL

Between

JENNA CORDEROY

Appellant

and

INFORMATION COMMISSIONER

First Respondent

DEPARTMENT FOR EXITING THE EUROPEAN UNION

Second Respondent

Appearances:-

Appellant: In person

First Respondent: did not appear

Second Respondent: Mr R Moules

Cases

DFESv IC (EA/2006/006)

DBERR v IC and Friends of the Earth (EA/2007/0072)

Maurizi v Information Commissioner, Crown Prosecution Service (Interested Party, Foreign and Commonwealth Office) [2019] UKUT 262 (AAC)

DECISION

1. The tribunal allows the appeal in part and substitutes the following Decision Notice.

SUBSTITUTED DECISION NOTICE

Dated 22 November 2019

Public authority: DEPARTMENT FOR EXITING THE EUROPEAN UNION

Address: 9 Downing Street, London, SW1A 2AS

The substituted decision

For the reasons set out in the Tribunal's determination, the public interest in disclosing the information identified in the confidential annex outweighs the public interest in maintaining the exemption.

Action required

The public authority disclose the identified information within 28 days of the date of this notice.

Judge C Hughes

REASONS FOR DECISION

2. Ms Corderoy is a freelance investigative journalist working with the website OpenDemocracy. On 23 October 2017 and 24 November 2017 she made successive requests for information of the Department for Exiting the European Union (DExEU) about contacts between that government department and a Mr Singham who was for a period associated with an organisation called the Legatum Institute. The first request:

"According to the gov.uk website (ministerial meetings, April to June 2017), there was a meeting between Lord Bridges Of Headley and the Legatum Institute in April 2017, where there was a discussion on the Department for Exiting the European Union policy. See:

<https://www.gov.uk/government/uploads/sy...>

Regarding this meeting, I would like the following information:

- *The location of the meeting*
- *A copy of the agenda for the meeting*
- *Materials that were handed out and received during the meeting, such as presentation slides, brochures, reports, and leaflets*
- *Minutes taken during the meeting, as well as any accompanying briefing notes and papers."*

Having received some information on 20 November she made the second request:

"According to a previous disclosure to a FOI request, there were meetings with Legatum representatives in September 2016, February 2017, July 2017 and August 2017.

For each of these specified meetings, I would like the following information:

- *A full list of attendees, including the full names and titles of each attendee, as well as who each attendee represents*
- *The exact time and date of when the meeting took place*
- *The location of the meeting*
- *A copy of the agenda for the meeting*
- *Materials that were handed out and received during the meeting, such as presentation slides, brochures, reports, and leaflets*
- *Minutes taken during the meeting, as well as any accompanying briefing notes and papers."*

3. The Department responded to these requests on 20 November 2017 and 24 January 2018 supplying some information, stating certain information was not held and withholding other information. Ms Corderoy sought internal reviews of these decisions on 9 January 2018 and 6 February 2018. The Department finally responded to these requests for review on 29 June 2018 upholding its refusal to provide certain information on the grounds of exemptions contained in s35(1)(a) and s27(1)(a-d) of FOIA. On 28 and 29 September Ms Corderoy complained to the Information Commissioner (the IC) about the handling of her requests.
4. The IC investigated whether these exemptions were properly applied. During the course of her investigations she investigated whether any information within scope was already in the public domain. The Department established that certain material was or had been publicly available and provided it to the Appellant on 30 January 2019.
5. In her decision notices of 4 and 11 March 2019 the IC concluded that s35(1)(a) applied to the information:-

"(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

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

6. In considering where the balance of public interest lay between disclosure and withholding of the information she noted that the purpose of the exemption was to prevent disclosures which would undermine the policy process and make it less robust. Her guidance (developed in the light of caselaw) advises that a public announcement of the decision is likely to mark the end of the policy formulation process. The department had informed her (DN paragraphs 15,17,18) that:

“..the information in the scope of the request constitutes part of its wide range of on-going stakeholder engagement and analysis. Specifically the information constitutes economic and trade policy matters and negotiations with the European Union (‘EU’) in general. The formulation and development process remained at the time of the request, and continues to remain live.

17. DExEU added that it considers that the policy formulation for the UK’s withdrawal from the EU is unique, and the issues relating to the development of trade policies following the exit of the EU is a key part of the negotiations in our withdrawal agreement. DExEU explained:

“..the further development of the UK’s independent trade policy beyond its economic partnership with the EU, which will be formulated throughout the transition phase up to 2020 (and possibly beyond). This topic remains live and it is necessary to provide a ‘safe space’ for this policy development to happen. It is accepted that the Government needs a safe space to develop policy and to reach decisions protected from external interference and distraction,”

18. DExEU further advised the Commissioner that to release the requested information, or information similar to it, would weaken and undermine the UK’s negotiating positions and policy formulation:

“It is the Department’s firm position that the information in scope relates closely to the on-going policy process, and thus engages section 35(1)(a).”

7. In response to Ms Corderoy’s concerns about what she considered the disproportionate influence the Legatum Institute and an individual associated with it on the formation of policy the Department indicated:-

“23 ...Transparency data published on gov.uk detailing Ministerial and Senior Staff meetings, including on policy matters, sets out various meeting and engagements including those referenced in regards to Ms Corderoy’s FOI request. Of the several hundreds of entries published (in excess of 800 entries for the period up to Ms Corderoy’s first request), four meetings with Ministers and three with the department’s Permanent Secretary are listed as taking place with Legatum between July 2016 and the end of October 2017.

24. DExEU reiterated its view that it must be able to consult with a wide range of stakeholders in a free and frank manner to fully inform any policy formulation, and to consider research and analysis from a variety of sources. It advised the Commissioner:

“DExEU would also highlight that the policy formulation process is complex and engagements with Ministers and Senior Officials should not be seen as the only way to engage with, and inform government as it prepares for the UK departure from the EU.”

8. The IC accepted Ms Corderoy’s concerns and the public interest in assisting with an informed public debate on issues concerning the withdrawal of the UK from the EU. She noted Ms Corderoy’s specific interest was the access enjoyed by the Legatum Institute and the Department’s claim that:-

“Legatum’s ‘access’ comprises 7 meetings out of 800 cited in published transparency data. The Commissioner is unable to comment on whether this data accurately reflects all formal and informal meetings/access taking place, nor is it her role to do so.”

9. The IC concluded:-

“33. The Commissioner has ultimately concluded that, notwithstanding the huge importance of trading policies for the well-being of UK citizens post Brexit, the arguments in favour of disclosure of the information in this case are outweighed by the public interest in maintaining the exemption.

34. She has reached this conclusion having seen the content of the withheld information and given the weight she believes should be attributed to the safe space arguments. The Commissioner agrees that there is a clear public interest in the disclosure of information which would inform the public about government policy making on this aspect of Brexit. However, ultimately she believes that, in the particular circumstances of this case, there is a greater public interest in ensuring that Brexit policy making has the best opportunity to be of the highest quality, given the significance of the policy decisions to be taken.”

10. The IC concluded that the exemption had been properly applied in both cases and criticised the Department for the protracted periods of time it had taken to conduct the internal reviews. In the light of her decision with respect to s35(1)(a) she did not further consider the application of s27(1)(a-d).

11. In her appeal Ms Corderoy gave details which had come into the public domain since her information request of the activities and level of access that Mr Singham enjoyed. On her account he was the only think tank member who attended two seminars at Chevening (the state-owned country residence which several Secretaries of State (including The Secretary of State for DExEU use) in July and September 2017. She gave considerable details of his activities. She drew attention to a report by the Charity Commission in June 2018 which concluded that its work on Brexit crossed a clear line and failed to meet required standards of balance and neutrality. She indicated that in July 2018

the Institute of Economic Affairs, with which Mr Singham was also associated *“is facing two official investigations after it emerged that the think tank offered potential US donors access to UK government ministers as it raised cash for research to promote free-trade deals demanded by hardline Brexiters”* she gave details of findings by the Charity Commission relating to breaches by the Institute of Economic Affairs concerning Mr Singham’s activities as well as claims that he had a number of meetings with DExEU Ministers.

12. In addressing what she considered to be failings in the ICO’s decision she argued that the IC had not considered whether the information itself was particularly sensitive, that the ICO’s own guidelines emphasised on s35:-

“225. Departments should always consider whether there are additional arguments in favour of disclosure, relating to the particular circumstances of the case. For example, these could include transparency in relation to the influence of lobbyists, accountability for spending a large amount of public money, the fact that a proposal has a significant impact on the public, a reasonable suspicion of wrongdoing or flaws in the decision-making process, or a potential conflict of interest.”

13. She emphasised the significance of the issue for which the Department was responsible and its possible severe impact on the lives of members of the public. She agreed with the IC that 'Brexit cannot be compared to any other government policy'. She argued the importance of public access to assess whether policy had been well-formulated and developed. She criticised DExEU’s record of tardiness in dealing with information requests. She argued on the basis that the hearing was in late 2019 that the need to withhold information about meetings held years before had diminished, there was no reason to believe that the meetings were particularly sensitive. She doubted that releasing information about a couple of meetings in 2016 could undermine the UK’s negotiating position when there were hundreds of meetings with other stakeholders. She suggested that Ministerial meetings between Mr Singham of the Legatum Institute and relevant Ministers were not declared in the transparency logs, Mr Singham’s meetings were far more widespread than disclosed, he had great influence and the public was entitled to know how that influence was used. She felt that the Department applied s35(1) automatically and non-specifically and this obstructed journalists in their watchdog role.
14. In resisting the appeal the IC acknowledged the public interest in knowing about Brexit, however the development of policy about Brexit was an ongoing issue and it could not be assumed that the disputed information was no longer relevant. She acknowledged that there was public interest in the influence of lobbyists, however this was met in part by disclosure of data relating to meetings; she acknowledged that she was unable to comment on the accuracy of the data provided. One the basis of her review of the disputed information she was satisfied that disclosure may undermine the UK’s negotiating position.

15. In resisting the appeal DExEU supported the position of the IC. It helpfully addressed the consideration of s35(1)(a) in some of the early decisions of the predecessor to this tribunal, notably *DFES v IC* which stated:-

“75... (iii) the purpose of confidentiality, where the exemption is to be maintained is the protection from compromise or unjust public opprobrium of civil servants, not ministers...”

(iv) The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike...”

16. In *DBERR v IC and Friends of the Earth* in the context of the disclosure of discussions between the CBI and government, the tribunal noted:-

“117 in our view, there is a strong public interest in understanding how lobbyists, particularly those given privileged access, are attempting to influence government so that other supporting or counterbalancing views can be put to government to help ministers and civil servants make best policy. Also there is a strong public interest in ensuring that there is not, and it is seen there is not, any impropriety. ...

118 In view of the stated aims of the CBI and the evidence given by Mr Cridland in this case we consider that it is not possible to distinguish between their influencing and advisory roles when its officials meet with government and it would be naïve to take any other view.”

17. The DExEU also advanced the exemption contained in s27 FOIA. This provides:-

“27International 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,

(c)the interests of the United Kingdom abroad, or

(d)the promotion or protection by the United Kingdom of its interests abroad.”

18. In his evidence Mr Earl, a Deputy Director within the Department, addressed the policy development process. He confirmed that the publication of the White paper *The future relationship between the United Kingdom and the European Union* in July 2018 was a statement of the Government’s policy direction but it was, in his view, not a conclusion of the policy formulation. Other relevant dates included key speeches by Ministers, but these were milestones and not

conclusions of the policy process. He confirmed that Ministers and civil servants had regularly appeared in front of the relevant Parliamentary committees, but he was unaware if the Legatum Institute had appeared before those committees.

19. He acknowledged that there was a need for transparency with respect to relations with stakeholders, but did not consider that the need for transparency varied between different stakeholders such as business groups, civil society trade unions and think tanks. A safe space was needed for all as part of the policy process. The views of external stakeholders on how far their contributions could be made public varied. Sometimes they wished their contributions to be received in confidence, this could be for a variety of reasons including that they were not finalised positions or they had not yet been approved by the members of the organisation. His statement listed four think tanks out of 21 which had attended a workshop, he confirmed that the listed groups represented a wide range of views and showed that a balance of views was sought. He stated that there had been a series of roundtable meetings on different issues, however he could not confirm that these were held on Chatham House rules, nor could he confirm whether or not the different think tanks had equal access to Ministers. He was unable to state whether the disclosure logs listing meetings of Ministers with outside bodies were complete.
20. With respect to the Legatum Institute he stated that it was not possible to separate its role as trade expert from lobbyist for a particular approach. He acknowledged that it was likely to have a prior view on the issues under consideration and civil servants would take that into account in advising Ministers. The general approach of civil servants was to view contributions to the policy process with a critical eye in accordance with their professional obligations as civil servants.
21. He stated that the policy processes around Brexit did not follow the normal consultative process; it had been decided to follow a more fluid and iterative approach, particularly in the early stages (those stages covering the meetings which are the focus of the requests) with the spirit of the principles of consultation but there had not been a formal invitation for views.
22. In the closed session the tribunal discussed each withheld document with the witness, considering where it had originated and how the claimed exemptions might apply to it and how the balance of public interest could be struck.

Consideration

23. Ms Corderoy has drawn attention to guidance issued by the IC with respect to how s35 should be used. The Department drew attention to a number of first instance decisions which set out the framework it relied upon for maintaining

the privacy of these interactions, however, as was acknowledged, the process of Brexit was very drawn out and will continue for some years, on the basis of the interpretation relied upon by the Department the policy formulation is still continuing and the material should continue to be protected.

24. It should be noted that neither the Information Commissioner's guidance nor the first instance decisions of this Tribunal are binding on us. The Information Commissioner's guidance performs a valuable role in tracking and alerting others to the emerging jurisprudence on information rights. Many of the early decisions of the tribunal are however helpful in that they systematically attempt to analyse the range of factors relevant to specific provisions of FOIA. However these first explorations of the legislation were carried out with respect to specific circumstances. Each case turns on its own particular facts. The decisions of the Upper Tribunal and the Court of Appeal are of course binding on this tribunal. The key issues before the tribunal are identifying when the public interest balance should be struck and how the balance of public interest should be assessed it is clear from the authorities that this is done by identifying the harm or prejudice that the proposed disclosure would or may cause and the actual benefits disclosure would or may confer.
25. With respect to the question of when, Ms Cordery has argued that the balance should be struck at the date of the hearing. However the balance must be struck earlier and is fixed by the decision-making process of the public authority. The decision in *Maurizi* analyses the strands of caselaw pointing to either the date of the refusal of the request or the date of the internal review. While there was a clearly unconscionable delay in the Department finalising the internal review which finally occurred some months after the two requests for review were made, that date was shortly before the much-delayed publication of the Government's white paper in July 2018 which the tribunal considers marks a way station in the development of policy.
26. There is much useful discussion in the ICO guidance to which Ms Corderoy referred which is helpful in addressing the public interest balance in s35:-

198. Traditionally safe space arguments relate to internal discussions but modern government sometimes invites external organisations/individuals to participate in their decision making process (eg consultants, lobbyists, interest groups, academics etc). Safe space arguments can still apply where external contributors have been involved, as long as those discussions have not been opened up for general external comment. However this argument will generally carry less weight than if the process only involved internal contributors.

200. The government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision.

226.If only certain lobbyists/interest groups have been given access to government and the opportunity to influence public policy has not been extended to others then this will increase the public interest in disclosure/transparency. This is especially relevant where the policy is still being formulated and there is still opportunity for others to present their views, as this would broaden the range of opinions being taken into account.

27. The traditional approach of dividing the processes of government policy into a formation stage followed by an implementation stage may be appropriate in certain circumstances, however with respect to the policy that was evolving in relation to negotiations with the EU there is the very obvious difficulty that, as the witness properly pointed out, the process was iterative and had developed over several years and would continue to develop for a considerable period to come.
28. In the instant case the outcome of the 2016 referendum was adopted by the government as a binding decision that the UK should leave the EU. In the 3.5 years since then there has been considerable debate as to the practical interpretation of that decision and it has been at the heart of the political process. Many organisations have sought to influence the government's direction. Ms Corderoy's concern is that an obscure organisation has had a very high degree of access to the government processes, far more than other comparable organisations, there is the reasonable supposition that with access goes influence and she considers that it is in the public interest for the information about their contacts with government to be disclosed.
29. For an organisation offering analysis, opinions and services to Government, preceded (although we are not in a position to be certain about the extent of this) by a period of off the record or private engagement with Ministers to have four publicly disclosed meetings with Ministers and three with the Permanent Secretary in a 16 month period is an unusually generous access to government. Permanent Secretaries do not waste their time and clearly the Permanent Secretary saw some significance in these meetings. The various publications to which Ms Corderoy referred claim a far higher level of access to Ministers which has not been publicly disclosed in accordance with the standing arrangements for disclosure of such meetings. The argument advanced in Mr Earl's evidence that a range of think tanks had been invited to a roundtable meeting could not obscure the evidence that Mr Singham, while operating at the Legatum Institute, had a greater degree of access than other interested bodies and the point advanced in paragraph 226 of the IC's guidance is relevant. The unstructured nature of the policy process appears to have enabled Legatum to have a greater degree of access to government than would normally be the case. The considerations identified in *DBERR* (see above) are clearly relevant. It is also clear, from the findings of the Charity Commission that the Legatum Institute was in breach of its charitable

objectives by publishing a report about the benefits of free trade after Brexit in November 2017, which the Charity Commission ordered to remove from its website, that the Legatum Institute has not conducted itself entirely properly.

30. The Legatum Institute has volunteered its views to government and, as Mr Earl acknowledged, it is not possible to disentangle expertise from lobbying for a particular policy outcome and Legatum was seeking to shape government policy. While many bodies volunteer their views to government and do so in conditions of privacy, in a normal consultation process those views will be disclosed with the publication of a response to consultation. Furthermore major habitual consultees with government such as the CBI and TUC as part of their general public profile will make public statements concerning their stance on major issues which will be reflected in their submissions to government policy. While there may be criticism of the perceived undue influence of one group or another the public will be aware what such groups are saying and why they are advancing such arguments. The position is not the same with the Legatum Institute.
31. The wording of s35 clearly encompasses the disputed material. It is held by DExEU and relates to policy formulation. The key justification for the exemption and the need for a safe space for policy formulation is that without it there is a risk that internal communications will be less frank and candid and therefore the advice to Ministers and the consequent decisions will be less robust. Whatever force there is in this argument with respect to policy discussions between civil servants it is clear that it must have far less traction when applied to the contributions of organisations separate from government. They will make their contributions because they want to shape policy. Organisations which seek to influence policy formation can under normal circumstances expect to see their contributions summarised and publicly disclosed or disclosed by the organisations themselves as part of their own direct engagement with the public or their own widespread stakeholders from which it readily moves into the public domain. The unstructured and open-ended policy formation approach to this fundamental question should not enable outside bodies to attempt to shape or participate in internal policy process and delivery with confidence that disclosure of their contribution will not be subject to FOIA.
32. One significant difference between the parties was DExEU's view that the disputed info 'would not significantly inform the public'. Ms Corderoy advanced the perception that it was the work of journalists to piece information together and supply its context, and the witness might not be aware of the value it would have to a journalist. The tribunal felt that there was some validity to this approach.
33. The tribunal is satisfied that there is a clear and overwhelming public interest in the disclosure of the material which the Legatum Institute sent to the

DExEU or material summarising the points put forward by Legatum. The fact that the Legatum Institute marked some material as private and confidential does not seem to the tribunal to significantly advance the consideration of the public interest. This disclosure will not discourage contributions to government. Nor will the disclosure impede the government's ability to develop policy any more than issues raised in newspaper editorials and articles in economic journals which are the routine background with which government works.

34. There is however some force in the safe space argument with respect to the information generated by civil servants in response to the material provided by Legatum. Given the importance of ensuring that the civil service advises with candour and robustness there is some risk that disclosure of other material held would inhibit that process. The disclosure of information showing how government deals with or analyses particular submissions from outside bodies would not in this case add significantly to the public information and would create some risk to the process of government which this exemption is intended to protect. Such documents should therefore be withheld.
35. A similar approach to the material produces the same result with respect to the other exemption claimed. This provision deals with prejudice to the UK's International relations and interests abroad. The disclosure of what one lobbyist says to the UK government would be most unlikely to cause such prejudice.
36. The appeal is allowed in part with the material to be disclosed in accordance with paragraph 33 is identified in a confidential annex.

Signed Hughes

Judge of the First-tier Tribunal

Date: 22 November 2019

Promulgation Date: 29 November 2019