Neutral citation number: [2024] UKFTT 00062 (GRC)

Case Reference: EA/2023/0282

First-tier Tribunal

General Regulatory Chamber

Information Rights

Heard by CVP on 4 December 2023

Decision given on: 19 January 2024

Promulgated on: 26 January 2024

Before

TRIBUNAL JUDGE Stephen Cragg KC

TRIBUNAL MEMBER Paul Taylor

TRIBUNAL MEMBER Dan Palmer-Dunk

Between

PERRYS MOTOR SALES/PERRYS GROUP LIMITED

Appellant

-and-

INFORMATION COMMISSIONER

1st Respondent

-and-

HM TREASURY

2nd Respondent

Decision: The appeal is dismissed.

Substituted Decision Notice: There is no substituted decision.

The Appellant was represented by Mr West

HM Treasury was represented by Ms Ivimy.

The Commissioner made written submissions only.

REASONS

MODE OF HEARING AND PRELIMINARY MATTERS

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

2. The Tribunal considered an agreed open bundle of evidence comprising 504 pages, a closed bundle, written submissions from both parties and a bundle of authorities.

BACKGROUND

3. On 23 November 2021, following previous broader requests, the Appellant requested information from Her Majesty's Treasury (HMT) as follows: -

> To facilitate the FOIA search, we refer to the following correspondence (copies attached):
>
> 1. Letter from Mr Huw Evans (Director General of the Association of British Insurers) to Mr John Glenn MP (Economic Secretary to the Treasury) dated 25 September 2020.
>
> 2. Letter from Mr John Glenn to Mr Huw Edwards dated 25 September 2020.
>
> Request: Please disclose any recorded information created between 1 April 2020 and 31 December 2020 that you hold in the form of:
>
> 1. Minutes of meetings;
>
> 2. Notes of telephone conversations; and

> 3. Letters to which Mr John Glenn MP (Economic Secretary to the Treasury) was party concerning all or any of:
>
> a) discussions between HM Treasury and the Association of British Insurers
>
> b) discussions between HM Treasury and insurance companies
>
> c) discussions between HM Treasury and the Financial Conduct Authority in respect of the treatment of monies paid or payable under the Coronavirus Job Retention Scheme in business interruption insurance claim settlements.
>
> Please provide the information requested in electronic format.

4. On 17 December 2021, HMT responded and confirmed it held information within the scope of the request but argued that it was not obliged to provide it. HMT cited the following exemptions as its basis for doing so: - section 35(1)(a) Freedom of Information Act 2000 (FOIA) (development of government policy); section 42 FOIA (legal professional privilege); and section 43 FOIA (prejudice to commercial interests).

5. The Appellant requested an internal review on 10 February 2022. HMT sent the outcome of its internal review on 4 April 2022, and it revised its position. HMT withdrew reliance on section 43 FOIA and disclosed some information to the Appellant. However, HMT upheld its application of section 35 FOIA and section 42 FOIA in respect of the remainder of the information it held within the scope of the request. The Appellant contacted the Commissioner on 17 May 2022 to complain about the way the request for information had been handled.

THE DECISION NOTICE

6. The Commissioner produced a decision notice dated 9 May 2003. The Commissioner records the background to the request as provided by HMT as follows: -

> 10. HMT provided the following background information
>
> Following the outbreak of the Covid-19 pandemic in March 2020 there was significant uncertainty about whether and to what extent business interruption insurance policies responded to government-imposed restrictions on business activity. This resulted in significant and ongoing litigation, and a Supreme Court judgment in relation to a dispute between the Financial Conduct Authority (FCA) and a group of insurers was handed down in January 2021.

In addition, there was the related question of how business interruption insurance policies interacted with the various government business grants and support provided during the Covid-19 pandemic. A number of insurers were deducting the value of these government support payments from insurance policy payouts. The FCA, working closely with HM Treasury, considered this issue and sought independent legal advice on whether insurers, under the terms of their insurance contracts, were permitted to deduct government support from business interruption insurance payouts.

Following conversations with insurers, Huw Evans (former Director General of the Association British Insurers (ABI)) wrote to the then Economic Secretary to the Treasury, John Glen MP, confirming that a large number of insurers had committed not to deduct certain multi-purpose government grants from payouts. In September 2020, HM Treasury published a response from the Economic Secretary to the Treasury welcoming this commitment from insurers.

However, insurers continue, subject to individual policy wordings, to deduct certain other government support payments that relate to specific business expenses including the Coronavirus Jobs Retention Scheme (furlough).

Following the exchange of letters between HM Treasury and the ABI, both the FCA and the Treasury continued to monitor progress of business interruption payouts and consider whether any further policy response is needed.

The issue of deductions of certain government support payments remains the subject of ongoing litigation, such as *Stonegate v MS Amlin*. In this particular case, the High Court handed down its judgment, which found largely in favour of insurers, in October 2022 with the case expected to be the subject of further appeals in 2023. The government and FCA continue to monitor developments in this area .

7. In relation to its reliance on s35 FOIA, the Commissioner recorded HMT's position as follows:-

15. HMT explained that:

The in-scope information relates to the development of government policy regarding deductions of government Covid-19 business support payment, such as furlough payments, from business interruption insurance payouts .

16. It added that:

Policy work on this matter has been ongoing since the middle of 2020, as the situation regarding deductions became clearer. This work continues, with the FCA and government continuing to evaluate our policy position in relation to deductions. There remains ongoing litigation on the matter, the results of which could potentially prompt further policy changes. The government considers that this remains a live area of policy .

8. The Commissioner recorded the Appellant's views on the application of s35 FOIA as follows:-

> 17. The complainant expressed scepticism that section 35 could apply. They said:
>
> HMT has neither explained nor provided any details of the specific government policy which it asserts was being formulated or developed. It remains the case that there has been no White Paper, legislation or public announcement on the issue.
>
> It is unclear how HMT can maintain an argument that there is public interest in policies and to reach well-formed conclusions and judgments in the applicable context, when the Government does not appear to have developed any such policy or reached any conclusions and/or judgements on the matter which have been made available to the public. The case for disclosure in this regard is strengthened by the finding in Stonegate that there is no evidence in the public domain of the treatment of CJRS payments in business interruption insurance cases.

9. The Commissioner acknowledged that HMT had not explained in further detail to the Appellant what policy the information could relate to, and that it would have been helpful to the complainant had it done so. However, the Commissioner concluded that:-

> Nevertheless, having seen the withheld information and having considered the arguments of both parties, the Commissioner is satisfied that section 35(1)(a) is engaged in relation to the withheld information. HMT were monitoring the legal effects of an existing policy and, in the Commissioner's view, this relates sufficient to the development of policy such that, in the circumstances of this case, section 35(1)(a) is engaged.

10. Having reached that conclusion, the Commissioner went on to consider the application of the public interest test. The Commissioner set out the arguments from both parties and reached the following conclusions: -

> 32. The Commissioner acknowledges the important public interest points raised by the complainant. They raised what they saw as the lack of clarity in the government's position on the relevance of furlough payments in relation to insurance claims. The Commissioner notes that, at the time of the request, the Stonegate case was still ongoing. The complainant has interpreted comments by the judge in that case in support of the public interest in disclosure. In short, the complainant argues that elements of this judgement (which came after the request) reinforce their position that greater clarity is needed about the

> government's intention with regard to furlough payments. They argue that there is a public interest in doing so and that disclosure in this case would serve that interest.
>
> 33. The Commissioner also recognises that there is a strong public interest in insured parties knowing more about their legal rights and obligations as asserted by the complainant. One factor of the pandemic was the financial impact on businesses, particularly small businesses, and their employees.
>
> 34. The Commissioner cannot include in his consideration of the public interest test those factors which occurred after the time for compliance with the request, namely comments made in the outcome of the Stonegate case. However, he is satisfied that that complainant's points are well made without them.
>
> 35. However, the regarding the safe space need for discussion on a live matter are stronger. The Commissioner is satisfied that the matter was live at the time of the request and that there was ongoing litigation (albeit a case to which HMT was not a party).
>
> 36. The Commissioner accepts that significant weight should be given to safe space arguments ie the concept that the Government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction where the policy making is live and the requested information relates to that policy making.
>
> 37. The Commissioner accepts that disclosure of the information at the time of the request would have had a direct and detrimental impact on the policy development process related to a live matter. In his view, the safe space arguments therefore need to be given notable weight.

11. On that basis the Commissioner concluded that the balance of the public interest favours maintaining the exemption, and that HMT was entitled to rely on section 35(1)(a) FOIA.

12. Although HMT argued that s35 FOIA applied to all the withheld material, it also argued that s42 FOIA applied to particular parts of it, as legal professional privilege (LPP) in the form of 'advice privilege' applied to this information. Having seen the withheld information, the Commissioner agreed with this (paragraph 41 of the decision notice), and that the public interest favoured withholding this part of the information under s42 FOIA:-

> 46…There is a strong public interest in protecting ability to obtain and consider legal advice without the fear of premature disclosure. Whilst the Commissioner has considered the complainant's public interest arguments, he does not consider that they justify disclosure in this case.

THE LAW

Section 35

13. Section 35 is intended to protect good governance and preserves a space for the government to consider policy options in private. Section 35(1)(a) FOIA states that: -

> (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.

14. Section 35(1)(a) FOIA is a class-based exemption. Accordingly, it is not necessary for a public authority to demonstrate any prejudice arising from disclosure in order for the exemption to be engaged. The Upper Tribunal in *Cabinet Office v IC and Morland* [2018] UKUT 67 (AAC) made clear that the focus of s35(1)(a) FOIA was 'on the content of the requested information and not on the timing of the FOIA request in relation to any particular decision-making process. There is no requirement on the face of the legislation that the policy-making process must still be live in order for the qualified exemption to bite' (paragraph 29).

15. The Information Commissioner has also provided guidance on the application of s35(1)(a) FOIA which will be referred to below.

Public interest test

16. The exemption in s35(1)(a) FOIA is qualified by a public interest test by virtue of section 2(2) FOIA. Even if the exemption is engaged the public interest in disclosing the information may outweigh the public interest in withholding the information. The Tribunal should weigh the public interest in maintaining the exemption against the public interest in disclosing that information. Only if this weighing process favours maintenance of the applicable exemption(s) is the duty to communicate the requested information disapplied.

Section 42 FOIA

17. Section 42(1) FOIA states that:-

> (1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

18. Section 42 is also qualified by a balance of public interest test by virtue of section 2(2) FOIA.

THE APPEAL AND RESPONSE

19. The appeal in this case is dated 6 June 2023. In the grounds of appeal, the Appellant argues that the Commissioner erred in concluding that:- (a) the exemption in section 35(1)(a) FOIA was engaged in relation to the withheld information; (b) the balance of the public interest favoured the maintenance of the exemption under section 35(1)(a); (c) the exemption in section 42(1) FOIA was engaged in relation to parts of the withheld information; and (d) the balance of the public interest favoured the maintenance of the exemption under section 42(1) FOIA

Whether the exemption under section 35(1)(a) FOIA is engaged

20. The Appellant complained that neither HMT nor the Commissioner identified the particular policy to which the withheld information is said to relate (grounds, para 44).

21. The Commissioner's response is that there is no requirement that the specific policy must be publicly identified either by the public authority or the Commissioner in order for the exemption under s35(1)(a) FOIA to be engaged, and whether or not the policy is publicly identified has no bearing of any kind on the Commissioner's analysis.

22. The Appellant also disputes the Commissioner's finding that the policy in question was 'live' at the time of the Appellant's request, since any such policy 'must have been developed

at the time of the introduction of the furlough scheme in March 2020, more than 18 months prior to the request' and the request itself only sought information for the period between 1 April and 31 December 2020 (grounds, para 48).

23. The Commissioner responds that this is 'no more than speculation' and 'also overlooks the obvious point that, at the time of the request, HMT was monitoring the pending claim in Stonegate, 'the result of which may require either the government or the regulator to modify its policy position' (see paragraph 25 of the decision notice).

24. The Commissioner argues that the question of whether the policy-making process is still 'live' at the time of the request is a matter that goes to the balance of the public interest, not to whether the exemption is engaged: see *Morland* as referred to above.

25. The Appellant goes on to say that the exemption under section 35(1)(a) FOIA can only apply to circumstances 'where a change of policy is under active consideration given that all Government policy is to some extent under constant monitoring or review' (grounds, paragraph 49).

26. The Commissioner responds that HMT's position was that 'policy work on this matter had been ongoing since the middle of 2020, as the situation regarding deductions became clearer' and that this work continues (see decision notice paragraph 16, above), and that the ongoing litigation may require further changes (decision notice paragraph 25). The Commissioner, stated that he was 'satisfied that the matter was live at the time of the request and that there was ongoing litigation (albeit a case to which HMT was not a party)' (decision notice paragraph 35), and says that the Appellant's claim that the monitoring of the proceedings was the 'only basis' on which the exemption was engaged (grounds, paragraph 50) is incorrect.

27. The Commissioner argues that the Appellant's claims that the policy in question was 'determined when the furlough scheme was introduced' and that it was 'well beyond the stages of formulation and development by 30 December 2020' (grounds, paragraph 51) are 'no more than speculation on its part and do not disclose any error of law by the Commissioner'.

The balance of the public interest in relation to the maintenance of the exemption under s35(1)(a) FOIA

28. The Appellant argues that even if the withheld information did engage the exemption under s35(1)(a), the balance of the public interest nonetheless favours its disclosure.

29. The Appellant points to a number of public interest factors in favour of disclosure (see ground, paragraphs 55(a)-(h) and 56) including (a) public interest in the government's intentions concerning the identity of proposed beneficiaries; (b) details of the discussions between HMT, ABNI and insurance companies as yet undisclosed; (c) the fact that some third parties therefore had an opportunity to influence HMT's policy; (d) the lack of information already in the public domain on this issue; (e) the interest of insured parties in understanding their legal rights and obligations; (f) the consequent pressure that lack of disclosure puts upon the civil justice system; (g) the public interest in taxpayers knowing how public funds are disbursed and to whom; and (h) the fact that the request was made two months after the furlough scheme had been wound up.

30. The Commissioner responds that Appellant does not suggest that the Commissioner failed to take any of these factors into account when assessing the balance of the public interest under s2(2)(b) FOIA, and that the Appellant's complaint is that the Commissioner accorded greater weight to HMT's arguments (as recorded above). The Commissioner notes that the decision notice, paragraph 38, went so far as to describe the weight to be given to safe space arguments as 'ultimately compelling'.

31. The Appellant's case is that this assessment was in error because the Commissioner provided 'no explanation' or alternatively 'no sufficient explanation' as to what the relevant live matter was (grounds, paragraph 59). The Appellant suggests that the Commissioner fell into error by taking into account the potential impact of disclosure on future decision making, rather than its impact on 'a policy position which has already been taken' (grounds, paragraph 59). The Commissioner describes this as 'no more than a collateral attack on the Commissioner's finding that the policy was 'live'.

Whether the exemption under s42(1) was engaged and the public interest

32. The Appellant raises the point that it is difficult to see how parts of the withheld information could engage legal advice privilege and, thereby, the exemption under s42(1) FOIA (grounds, para 63) since there could be no lawyer-client relationship between lawyers acting for HMT and those of third parties, nor any common interest between HMT and any of the identified parties 'save perhaps between HMT and the FCA'.

33. The Appellant has not seen the material in question in relation to s42(1) FOIA. The Commissioner responds that he is satisfied that parts of the withheld information are subject to advice privilege as claimed by HMT. In relation to the application of the public interest test for the purposes of s42(1) FOIA (assuming it applies) the Appellant argues that the balance of the public interest nonetheless favours its disclosure (grounds, paragraphs 65-67). The Commissioner points to case-law which establishes the 'significant' in-built weight in withholding information to which legal professional privilege applies and says this is of particular importance where there is ongoing litigation.

THE HEARING

34. On behalf of HMT, Shannon Cochrane, Deputy Director of the Insurance and Pensions Markets team, gave evidence by way of a witness statement and orally at the hearing. Parts of her witness statement were redacted and were only available in the CLOSED bundle, and Ms Cochrane also gave evidence in a CLOSED session.

35. In her OPEN evidence, Ms Cochrane explained in her statement that:-

> 9. In summary, from March 2020, HMT introduced a number of support schemes for businesses in response to the emergency of the pandemic. These included grant schemes, where monies were paid directly by way of grant to businesses, and what became known as furlough scheme payments. Under that scheme, employers could receive a government grant to cover the majority of wages for employees not working due to coronavirus restrictions…

10. At the same time, many businesses claimed on business interruption insurance policies for losses incurred as a result of the pandemic and pandemic related restrictions…There were divergences between insurers in their responses to the claims, with some insurers refusing to pay out at all.

11. A related issue, if claims were in principle payable, was how loss should be calculated having regard to the various support schemes the Government had put in place. In summary, the issue was whether support scheme payments should be deducted from business interruption payments during claims, or whether businesses were entitled to keep the benefit of those payments in addition to any sums payable under insurance contracts…

12. From around April 2020, HMT considered how to respond to these issues as a matter of policy. HMT was concerned because, although payments under insurance contracts are ultimately a private matter between insured businesses and insurers, there were a very large number of affected insurers and businesses and the issue concerned the proper treatment of money paid out of public funds by HMT. HMT engaged with insurers and insured businesses, and with the regulators. There are two regulators of the insurance industry. The Financial Conduct Authority ('the FCA') is responsible for the conduct regulation of financial services firms, including insurers. In particular, the FCA works with firms to ensure fair outcomes for consumers. The Prudential Regulation Authority ('the PRA#), which is part of the Bank of England, prudentially regulates insurers (together with financial institutions such as banks and building societies) to ensure firms act safely and to safeguard against firm failure and risks to the financial system more broadly.

13. In June 2020, the FCA took a test case to determine whether business interruption claims for pandemic related losses were payable, based on a variety of standard wording used in policies. The trial took place in July 2020 and judgment was handed down on 15 September 2020. The case was then leapfrogged to the Supreme Court. The hearing was in December 2020 and judgment given on 15 January 2021, which found largely in favour of the FCA (and therefore insured businesses). The test case determined a range of issues relating to the validity of claims and the way claims should be calculated. It did not determine whether government support payments could be deducted from claims, although some aspects of the legal reasoning were of potential relevance to the deduction issue.

14. On the deduction issue, HMT engaged and coordinated closely with the FCA, including in the commission of legal advice. HMT also engaged with stakeholders such as the Association of British Insurers, individual insurers, insurance brokers and others. Internally, the issue was also considered by officials and ministers. The purpose of this engagement and internal discussion was to seek to understand the

legal and practical issues in relation to deductions, and to formulate a policy response. Potential policy options and responses for HMT on the deduction issue included: seeking to negotiate an informal solution with industry; supporting a regulatory response by the FCA; intervening or engaging in litigation; and introducing legislation. For example, HMT could have introduced legislation to prevent the deduction of some or all Government support schemes, though clearly such a measure would come with significant complexity and risk of legal challenge.

15. In the event, the Government, in consultation with the FCA, set out its expectation that grant funds intended to provide emergency support to businesses were not to be deducted from business interruption insurance claim payments. In his letter of the 25th September 2020 to the then ABI Director General, the Economic Secretary to the Treasury listed the Coronavirus Small Business Grant Fund; the Retail, Hospitality and Leisure Grant Fund; and the Local Authority Discretionary Grant Fund; and their devolved equivalents as examples.

16. For other forms of support, the Government made clear that it supported the FCA's position that firms should carefully consider the appropriateness of deductions in the context of individual insurance policies, and that any deductions should be considered on a case by case basis. Though furlough was not explicitly mentioned in the letter, this was the Government's position in respect of furlough deductions.

17. Various letters and statements were published during this time by the FCA and HMT explaining this. The FCA published a statement on 3 August 2020…and wrote to insurers on 18 September 2020, publishing its letter on its website. An exchange of letters between the Economic Secretary to the Treasury and the Director General of the Association of British Insurers dated 25 September 2020 was also published …These letters reflected the agreement reached with industry on treatment of grant payments, and the FCA's already published position that the appropriateness of deductions should otherwise be considered on a case by case basis.

18. HMT's policy position from September 2020 and through to December 2020 remained under active consideration and review. As set out in the Economic Secretary's letter of 25 September to the ABI, the Government committed to monitor grant deductions and, if needed, to consider further action. HMT was concerned to see whether the statements made by the ABI and HMT in their exchange of letters were followed by individual insurers, and how insurers approached other deductions, to determine whether further steps were needed in this area. HMT also continued to engage closely with the financial regulators, particularly the FCA, on issues relating to business interruption insurance, including the ongoing litigation, the progress of claims in general, and the issue of deduction.

19. From December 2020 and throughout 2021, HMT's policy position was that the issue of whether furlough scheme payments should be deducted from claims should be determined by insurers on a case by case basis. It confirmed this position in responses to written Parliamentary questions on 17 December 2020 and 21 April 2021. The FCA confirmed its position again in a published policy statement on 24 March 2021. However, during the period to December 2021 (when the Request was made), although HMT did not significantly alter its policy position, the issue remained under active consideration. For example, HM Treasury officials continued to monitor legal developments in business interruption insurance cases and continued to discuss with the FCA the progress of industry payment of claims and issues around deductions.

20. The issue remains live today. There are a number of cases which continue to be litigated concerning pandemic business interruption claims: for example, in October 2022 the High Court handed down three linked judgments on outstanding legal issues relating to business interruption insurance claims, including the issue of furlough deductions. HMT continues to monitor developments in the legal position and continues to consider the need for a policy response. For example, a significant legal ruling that mandated how furlough payments should be treated across a range of cases might require a reassessment of either HMT' s or the regulator's current position towards deductions.

36. Ms Cochrane explained that:-

22. It may assist if I explain that the disputed information does not contain communications with the ABI and other stakeholders. That is because the wording and scope of the FOI request excluded many documents relating to discussions with insurers, because they were not minutes of meetings, notes of telephone conversations or letters to which the Economic Secretary to the Treasury was party (the terms of the request).

23. HMT considers that all of the disputed information relates to the formulation or development of policy on the deduction of furlough payments from business interruption insurance claims. That is because, as explained in more detail above, it consists of discussion and legal advice on that issue, which was shared for the purpose of better understanding the issue and reaching a view on what policy action, if any, was needed by way of response.

24. The Disputed Information covers the period from April to December 2020. As I have explained above, at this time HMT, working closely with the FCA, was actively considering its approach and response to the issue of deductions from business interruption insurance payments. This included the active formulation and consideration of a range of policy options.

…

29. In addition, some of the information in scope is covered by legal professional privilege. The parts which HMT considers are subject to privilege are highlighted in the closed bundle.

37. In relation to public interest arguments, Ms Cochrane said:-

34…. I consider that disclosure would significantly intrude into the 'safe space' needed to discuss and formulate policy, including with independent regulators, and would inhibit future discussions, in circumstances where there is no compelling public interest to outweigh that harm.

35. It is vital that HMT, which has responsibility for financial services policy and legislation, is able to exchange advice and free and frank views with the operationally independent financial regulators, the FCA and PRA. Premature disclosure of such exchanges risks undermining the essential exchange of advice and views between the Government and the financial regulators during the development of policy.

36. In particular, as I have set out above, it is a particular feature of the present case that much of the disputed information contains discussion of legal issues in a context where these issues were developing, and legal arguments were being tested and expected to be tested in litigation in circumstances where HMT and/or the FCA might be required to intervene in that litigation or respond to it with regulatory or legislative action. It is obviously in the public interest that HMT should be able to discuss sensitive legal matters of this kind freely and frankly internally and with regulators in the reasonable expectation that confidentiality would be maintained, at least while the issue remains sensitive.

37. Disclosure in the present case risks not only inhibiting future engagement of this kind, but also the important relationship of trust and confidence on such issues between HMT and external entities with whom it has confidential discussions. It is not in the public interest for early thinking and discussions of the merits of legal arguments to be disclosed in these circumstances. There is also a risk that, without such exchange of advice and views, future collaboration during crises may be limited. There may also be a decline in the efficacy of future policy development processes, leading to poorer policy outcomes in a key area of public policy.

38. Ms Cochrane was asked questions based on her statement. In her oral evidence Ms Cochrane accepted that she had not been directly involved in the policy formulation described in the statement and that her evidence is based on discussions with others and perusal of the relevant documents. She stood by the contents of her statement. She accepted that in paragraph 19 (as set out above) she stated that from 'December 2020 and throughout 2021, HMT's policy position was that the issue of whether furlough scheme payments should be deducted from claims should be determined by insurers on

a case by case basis'. However, she said that this was not a fixed policy, and that as also stated in paragraph 19, the issues were kept under 'active consideration' throughout that period, and there was policy development and monitoring not least because of the ongoing *Stonegate* litigation.

39. Ms Cochrane emphasised the need for HMT to be able to 'exchange advice and free and frank views with the operationally independent financial regulators' as she set out in her witness statement at paragraphs 35 and 36.

40. In the CLOSED session (of there is a gist set out at Annex A) the Tribunal was referred to passages in the Disputed Information which HMT submitted showed that it related to policy which was being actively formulated and developed through the entire period April to December 2020.

41. The Appellant maintained the argument that the formulation and development of policy had ended in this case and warned against 'scope creep' as eroding the constraints on the application of the section 35(1)(a) FOIA exemption, and submitted that on HMT's own pleaded case, the "issue of deduction of furlough payments from business interruption insurance claims" was formulated by September 2020. The Appellant argued that throughout both the Commissioner's and HMT's pleadings there is a confusion between (a) formulation and development of policy, (b) monitoring of a formulated policy and (c) modifying that formulated policy, and that these are quite separate and distinct phases. The Appellant's case was that this happened for example where the Commissioner says that at the time of the request, HMT was monitoring the pending claim in Stonegate, 'the result of which may require either the government or the regulator to modify its policy position' (decision notice paragraph 25), thus running together all three stages of policy formulation/development, monitoring and modification.

42. The Appellant argues that HMT does the same: having acknowledged the formulation of a policy by September 2020, HMT then says that it continued to monitor developments and keep its policy position under review and the 'issue' remains live as there is ongoing litigation (as explained by Ms Cochrane in her statement).

DISCUSSION

Section 35(1)(a) FOIA – is the exemption engaged?

43. The Tribunal accepts the evidence of Ms Cochrane that during the period April to September 2020, HMT was actively exploring and considering the issue of the treatment of government support payments in BII claims and formulating its policy position and response.

44. Although Ms Cochrane's evidence is that the practical approach was to treat cases on a case-by-case basis there was a clearly a fluid situation which was being actively monitored and reviewed by HMT. Ms Cochrane's evidence was that there were a number of policy options open to it.

45. In September 2020, HMT there was an industry response that certain types of grant would not be deducted. HMT set out its expectation that those grants should not be deducted and that other deductions should be considered by insurers having regard to the wording of particular policies and on a case-by-case basis.

46. From September 2020, we accept the evidence that HMT kept its policy under active review, monitoring developments in the form of industry responses and litigation, and coordinating with the FCA, with a view to adjusting its position or taking further steps if required. In our view given the uncertainty of the position, including in the light of ongoing litigation, there was really no other option but for HMT to be in a position to formulate and monitor policy during the period covered in the request for information. Having heard and read the evidence, we accept the description in the HMT skeleton argument (paragraph 22) that:-

> All of the Disputed Information accordingly relates to the formulation and development of policy on the treatment of furlough scheme payments in BII insurance claims. It also relates to linked policy issues such as how to structure support payments and potential future schemes so as to ensure the most effective and efficient use of public money.

47. In our view, that formulation also covers the Appellant's complaint that HMT has not indicated the policy to which the withheld information relates. The formulation describes the policy issues involved and to which the withhold information relates.

48. We also accept that HMT's policy approach was not settled by March 2020, as the Appellant argues it must have been, or even by September 2020. Given the speed with which the furlough scheme was developed and introduced, there was no settled legal position on a range of legal issues that arose, including the proper treatment of furlough payments under the many BII policies in place across the private sector. We accept the evidence that HMT, completely understandably, did not have a concluded view as to its policy on that issue in March 2020, or in September 2020, and that policy was formulated and developed thereafter.

49. Referring to the Commissioner's guidance[1] as to 'the formulation or development of government policy' we note the view that these terms 'broadly refer to the design of new policy, and the process of reviewing or improving existing policy' but that 'the exemption does not cover information relating purely to the application or implementation of established policy'. We also note the view that:-

> …there are no universal rules: policymaking models are always evolving, and may vary widely between departments and situations. It is likely that some policy areas will follow a more rigid, formal development process to maintain stability and certainty, while other policy areas are more fluid and need to evolve quickly.

50. In our view, this guidance supports our conclusion as to whether s35(1)(a) FOIA applies in this case. According to the evidence, there was no fixed policy during 2020, and the policy was being formulated and developed throughout the period covered by the withheld information (which clearly related to the policy). As the policy was being formulated and developed in a fluid and evolving environment, this was not a situation which concerned only the application, modification or implementation of established policy.

[1] https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/

Section 35(1)(a) FOIA – the public interest test

51. Having found that the exemption in s35(1)(a) FOIA is engaged, the Tribunal must go on to consider whether the exemption can be maintained in the public interest or not.

52. There is clearly public interest in accountability and transparency in relation to HMT's approach on the proper treatment of government support payments in BII claims. HMT says that it has addressed that public interest to an extent at least, acting in co-ordination with the FCA, by publishing both letters and statements in 2020 and 2021 setting out the Government and regulatory approach, and that in September 2020 HMT published the exchange of letters with the ABI explaining an agreed industry approach.

53. We accept that the public interest in disclosure is enhanced because the issue of the proper treatment of government support scheme payments, including furlough payments, in BII claims was novel and complex, and directly affected the public and private sectors as well as many individual insurers and insured businesses. It concerned large sums paid out of public funds.

54. We note that the Commissioner's guidance explains that:-

> The key public interest argument for this exemption usually relates to preserving a 'safe space' to debate live policy issues away from external interference and distraction. There may also be related arguments about preventing a 'chilling effect' on free and frank debate in future…
>
> The exact timing of a request is very important. If the information reveals details of policy options and the policy process remains ongoing at the time of the request, safe space and chilling effect arguments may carry significant weight.

55. We accept the evidence that the issue remained live at the date of the request and response, and litigation was on-going at the time of the request and has continued to date. There was an ongoing need to consider and respond to developments, and potentially introduce updated policy responses. The request itself was made less than

12 months after the withheld information was created and the issue was therefore very recent.

56. In general terms, we are of the view that HMT officials should not necessarily require a 'safe space' to discuss policy issues, and that the disclosure of information relating to such discussions should not always have a future 'chilling effect' on officials.

57. However, in this particular case we can understand the importance of maintaining a safe space for officials and ministers to consider and take advice on the issue, especially when responses were also being discussed with external bodies including the FCA as regulator. We agree with the HMT skeleton argument analysis that 'Premature disclosure of on-going thinking and discussion, including frank discussion of legal options and advice, had the potential to distract from and undermine the policy process, and to disrupt both regulation and litigation of related issues'.

58. Having seen the withheld material (which of course the Appellant has not), we are able to address some of the other points which have been raised which it is said support the public interest in disclosing the information. Thus, the withheld material does not reveal the Government's intention in implementing the furlough scheme in so far as the identity of proposed beneficiaries concerned. There is nothing in the withheld material which supports an assertion that lobbying by members of the insurance industry influenced HMT's approach, as opposed to a reflection of reasoned legal thinking. We agree with HMT that disclosure would not properly assist in understanding of legal rights, prevent further litigation, or assist the public in knowing how monies raised through taxation are disbursed.

59. In our view and in the particular circumstances of this case, where a number of bodies were involved in the discussion of formulation and formulation of important live policy in a time of legal uncertainty and during a pandemic, the need to retain a safe space for the debate of policy issues away from external interference and distraction, outweighs the public interest factors identified and discussed above in favour of disclosure.

Section 42(1) FOIA

60. Having found that all of the withheld information in this case is exempt from disclosure by the proper application of ss35(1)(a) FOIA, it is unnecessary for the Tribunal to go and consider the application of s42(1) FOIA in relation to part of that information.

CONCLUSION

61. No substituted decision notice is issued in relation to the decision notice in this case and the appeal is dismissed.

Recorder Stephen Cragg KC

Sitting as Judge of the First-tier Tribunal

Date: 19 January 2024

ANNEX A – GIST OF CLOSED SESSION

Evidence

1. In the closed session, the witness of behalf of HMT, Ms Cochrane, gave evidence on the content of the Disputed Information, and was asked questions on it by the Tribunal members.

2. Ms Cochrane expanded on her open evidence in response to questions from Ms Ivimy and the Tribunal. She stated in relation to the exchange of letters dated 25 September 2020 that from her experience she expected that HMT must have known the content of the letter in advance in order to provide a response so quickly, but she herself did not know what discussions preceded the letter.

3. It was agreed that paragraph 22 of the CLOSED witness statement could be put into OPEN. That paragraph states:

"It may assist if I explain that the disputed information does not contain communications with the ABI and other stakeholders. That is because the wording and scope of the FOI request excluded many documents relating to discussions with insurers, because they were not minutes of meetings, notes of telephone conversations or letters to which the Economic Secretary to the Treasury was party (the terms of the request)."

Submissions

4. Ms Ivimy referred to a CLOSED skeleton argument totalling 5 pages. The CLOSED skeleton argument addressed: the content of the CLOSED bundle; the information in scope; what information was said to engage s. 35(1)(a) (all the information in scope) and s. 42 FOIA (some parts of the information); and the public interest test.

5. In oral submissions, Ms Ivimy:

    a. further explained to the Tribunal what information was in scope of the Request;
    b. identified the parts of the information which she submitted were legally privileged and the basis on which s. 42 FOIA was said to be engaged;

c. referred to passages in the Disputed Information which she submitted showed that it related to policy which was being actively formulated and developed through the entire period April to December 2020; and
d. made submissions by reference to the specific content of the Disputed Information why disclosure would not be in the public interest.