NCN: [2025] UKFTT 00391 (GRC) Case Reference: EA/2023/0391

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Decided in the absence of the parties
Heard on: 3 March 2025
Decision given on: 7 April 2025

Before

DISTRICT JUDGE WATKIN
MEMBER SAUNDERS
MEMBER SHAW

Between

GEORGE GREENWOOD

Appellant

and

THE INFORMATION COMMISSIONER (1)
THE CABINET OFFICE (2)

Respondents

Decision: The Appeal is allowed in part.

SUBSTITUTED DECISION NOTICE

1. The Cabinet Office must by 16 May 2025:
    a. make enquiries of Mr Cummings and Mr Cain to establish whether they have retained and can produce any information, particularly in relation to WhatsApp messages which may be relevant to the request of the Appellant dated 28 May 2020;
    b. carry out a further search of its database to search for all relevant key words; and
    c. provide a witness statement to the parties confirming:

i. the outcome of the enquiries with Mr Cummings and Mr Cain;
ii. the relevant qualifications and experience of the individual performing any search;
iii. details of the searches carried out;
iv. confirmation of whether any additional information has been sourced; and
v. in the event of further information having been sourced, either providing the documentation or providing the reasons for withholding the information.

2. In the event that further documents are identified, and the Appellant is not satisfied with the reasons provided for the non-disclosure, his remedy would be to complain to the Information Commissioner pursuant to section 50 Freedom of Information Act 2002.

REASONS

The following terms are abbreviated:

The Data Protection Act 2018	DPA
The Freedom of Information Act 2000	FOIA
The Information Commissioner	IC

Where this decision refers to section numbers, the reference is to sections within FOIA (unless otherwise stated).

DOCUMENTS

1. Prior to the hearing, the Tribunal was provided with a 369-page open bundle and a 28-page closed bundle.

2. The Tribunal also considered:

a) Email from the Appellant dated 22 July 2024

b) the Further submissions of the First Respondent dated 16 December 2024.

c) the Reply of the Second Respondent to the Further Submissions of the First Respondent dated 9 January 2025.

3. Any references to page numbers within this decision are to page numbers within the open bundle.

CASE MANAGEMENT

4. In Case Management Directions dated 25 November 2024, the parties were informed that the Appeal would be considered without a hearing, and the parties consented.

5. The Appeal was listed for determination in the absence of the parties on 3 March 2025.

THE RELEVANT LAW

Jurisdiction

2. The Tribunal's jurisdiction is set out at section 58(1) which provides that the Tribunal shall allow the appeal or substitute such other notice as could have been served by the IC, and in any other case the Tribunal shall dismiss the appeal where the Tribunal considers that the notice is not in accordance with the law or that the Commissioner should have exercised his discretion differently.

3. Section 58(2) gives the Tribunal power to review any finding of fact on which the notice was based.

Freedom of Information

4. Section 1

"(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."

5. Section 1(4) provides that "*the information …is the information in question held at the time the request is received, except that account may be taken of any amendment or deletion made*

between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

The Exemptions

6. Section 2(2) provides that the public authority is not obliged to provide the information as required by section 1(1) where:

   a. an absolute exemption applies (as listed in section 2(3)); or

   b. one of the exemptions set out in Part II (and not listed in section 2(3)) applies and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

7. Section 21 is listed at section 2(3) as having absolute exemption and, therefore, the public interest test does not need to be applied to it. Section 36 is also listed but in relation to information held by the House of Commons or the House of Lords. For present purposes, section 36 does not confer absolute exemption and the public interest text applies.

8. The following exemptions are relevant to these Appeals:

   a) Information accessible by other means – section 21

   b) Prejudice to effective conduct of public affairs – section 36

Information Accessible to Applicant by Other Means

9. Section 21 applies where the information is otherwise reasonably accessible to the appellant.

Prejudice to Effective Conduct of Public Affairs

10. Section 36 applies to information which is held by a government department (or the Welsh Government) and is held by any other public authority (provided that it is not exempt by virtue of section 35 – *formulation of policy*). Pursuant to section 36(2)(c), this information is exempt if, in the reasonable opinion of a qualified person, disclosure

would prejudice, or would be likely to prejudice, the effective conduct of public affairs.

11. Section 36(5) sets out who a qualified person might be in relation to information held by different bodies. This includes:

> "*(o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means –*
>
> *(i) a Minister of the Crown,*
>
> *(ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or*
>
> *(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."*

12. In accordance with the view of the Upper Tribunal in ***Information Commissioner v Malnick and ACOBA*** **(GIA/447/2017) (1 March 2018),** the opinion expressed must be "*in accordance with reason, not irrational or absurd,*", "substantively reasonable and not *procedurally reasonable*".

13. The Upper Tribunal also noted the clear distinction between the two tests to be carried out in determining whether an exemption under section 36 applies. They described the test as to whether the qualified person's opinion was reasonable as the threshold question and stressed the importance of not conflating the threshold question with the balance of public interests.

14. In considering an exemption under section 36(3), it is the qualified person who must decide whether disclosure would prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs. If the opinion is reasonable, even if the Tribunal does not agree, the threshold is crossed, and the public interest test must be applied. "*The Qualified Person is not called on to consider the public interest test for and against disclosure.*" (paragraph 32). Equally, the Information Commissioner (or the Tribunal) is not required to determine whether prejudice will or is likely to occur.

15. Section 36 does not confer absolute exemption, unless the information is "*held by the House of Commons or the House of Lords*" (section 2(3)(e), neither of which apply in the present context.

The Public Interest Test

16. The public interest test is to be carried out on the date that the request for information is decided (***Montague v IC and DIT*** [2022] UKUT 104 (AAC) at [47]-[90]).

17. In ***O'Hanlon v IC*** [2019] UKUT 34 (AAC) at [15], the Upper Tribunal considered:

> "*The first step is to identify the values, policies and so on that give the public interests their significance. The second step is to decide which public interest is the more significant. In some cases, it may involve a judgment between the competing interests. In other cases, the circumstances of the case may (a) reduce or eliminate the value or policy in one of the interests or (b) enhance that value or policy in the other. The third step is for the tribunal to set out its analysis and explain why it struck the balance as it did*".

18. The Tribunal will weigh up the actual harm that the proposed disclosure may cause with the potential benefits of its disclosure ***APPGER v IC*** [2013] UKUT 560 at [74]-[76] and [146]-[152]. In doing so, the Tribunal will consider the content of the information and the possible consequences of disclosure or non-disclosure.

BACKGROUND

19. The Tribunal has considered the appeal (page 21) (the "**Appeal**"), by Mr George Greenwood (the "**Appellant**") dated 31 August 2023 which arises following a request for information (the "**Request**") made to the Cabinet Office ("CO**")** on 28 May 2020 (page 125).

20. The Request was for the disclosure of the following information:

> "*Please provide a copy of all emails, text messages, Slack messages, WhatsApp messages, and signal messages sent between Dominic Cummings and Lee Cain between 22 May 2020 and 28 May 2020*"

21. Both Mr Dominic Cummings and Mr Lee Cain were special advisers at the Prime Minister's Office during 2020, both leaving the civil service in November 2020 (page 151). From March 2020, travel restrictions had been imposed due to the coronavirus pandemic and, in March 2020, Mr Cummings travelled to Durham leading to widespread media coverage (page 215).

22. The CO provided a response to the Request in a letter dated 24 June 2020 ("the **Response**") (page 126). Within the response, the CO informed the Appellant that the Request was being treated as requesting all communications between Mr Cummings and Mr Cain, not limited to those relating to official government business only.

23. The CO indicated that the costs of providing the information was likely to exceed the appropriate limit of £600 and noted that the Appellant had not specified an area of interest to help focus searches. The CO suggested that the searches would be extensive as they would include searches of attachments to emails and paper documents. The CO declined the Request pursuant to section 12.

24. The Appellant responds on 29 June 2020 (page 128), pointing out that the time frame set out in the Request should result in the information sought being limited and section 12 being unlikely to apply.

25. The CO responded again on 23 July 2020 (page 140), indicating that the previous response had been intended as an offer of advice and assistance (for the purposes of section 16) and suggested that the Appellant again considers limiting the Request to a category of information and that, in the meantime, the Request is refused under section 12.

26. On 4 August 2020, the Appellant requests an internal review (page 142) and on 14 October 2020 (page 143), the CO confirms that it upholds the previous decision.

27. The Appellant complained to the IC and an investigation was carried out. Within a letter to the IC dated 6 October 2021 (page 146), after having been provided with repeated extensions of time to respond), the CO writes in detail to the IC, setting out that where emails are retained, they should be properly filed in official records and that electronic correspondence that does not need to be retained is disposed of. It is also stated that records are arranged by broad subject matter and not by sender or recipient and, therefore, complying with the request would require all records created during the period to be checked, hence the request that the Appellant limits his request to specific matters to alleviate the burden imposed by the request. The CO advised that it had checked the email accounts for Mr Cummings and Mr Cain and that this had not revealed any emails directly between them.

28. On 3 December 2001, the IC wrote to the CO to query whether emails are retained on email account even though they would also have been filed in official records and

requested a detailed estimate of the time/cost to provide the information. The IC expressed disappointment in the paucity of submissions provided and allowed the CO until 17 December to respond. The CO responded on 1 March 2022, reiterating that it had searched the email accounts but did not confirm whether emails are usually retained on an email account when moved to official files. In relation to the requested time/costs breakdown, the CO confirmed that emails are retained on email accounts for three months and any older information would be stored within corporate files, organised into subjects and topics, not recipients or senders and, even though the information was requested less than 1 month from its creation, the CO indicated that an extensive search would be required. The CO suggested that it would take 1 minute to review policy filing and correspondence and three minutes to review hard copy documents, an estimate of 25 hours.

29. The CO did not refer to the fact that the Request (and the CO's response) had been sent within three months of the date the information would have been created.

30. On 13 October 2022, the IC provided its initial decision (page 170) concluding that the CO was not entitled to rely on section 12 and requiring the CO to provide a revised response within 35 days. The IC concluded that the CO erred in its assessment of the estimated time/costs – describing the time as "erroneously elongated". The IC also noted that the information could have been dealt with by the "obvious and sensible means" of contacting Mr Cummings and Mr Cain. However, it does not appear that this occurred.

31. On 24 January 2023, a revised response was sent to the Appellant by the CO (page 173). The CO again declines to provide the requested information relying on the exemption under section 40(2) (personal data). The CO considered that the information was personal data which could not be processed lawfully, fairly and transparently (Article 5(1)(a)) as there was no legitimate interest for which the disclosure of the information was necessary, or which would override the rights and freedoms of the data subjects.

32. The Appellant complained to the IC on 29 January 2023 (page 176), stating that the CO's position was unsustainable as neither Mr Cummings nor Mr Cain have any reasonable expectation of privacy in relation to their professional affairs as government officials and that genuinely personal information can be redacted. He also

expressed concern that the extensive delays have significantly prejudiced his rights. The IC responded by encouraging the Appellant to request an internal review from the CO.

33. On 28 April 2023, a communication was sent to Baroness Neville-Rolfe, Minister of State for the Cabinet Office, requesting that, as the qualified person, she forms the opinion that the disclosure of the requested information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberations and would or would be likely to prejudice the effective conduct of public affairs. The recommendation is based on the premise that officials should be free to react to media enquiries instinctively and frankly in suggesting how an enquiry should be handled, drafting press statements, and expressing their views without undue concerns about premature disclosure. The communication suggests that disclosure could have an inhibiting effect on officials in the handling of media matters.

34. An email from the CO dated 2 May 2023 (page 191) has been provided. The recipient has been redacted but the email records that the qualified person considers that disclosure of the information would inhibit the free and frank exchange of views for the purposes of deliberation. On 16 June 2023, the CO wrote to the IC (page 195) advising that the CO was also relying on the exemptions at sections 21(1), 36(2) as well as 40(2) and set out detailed reasons.

35. On 28 June 2023, the IC responded to the CO (page 205) requesting further details of the qualified person opinion, a response was received enclosing the details and, in response to that, the IC in a letter dated 19 July 2023 (page209) enquired as to why the CO had previously indicated that no relevant information had been identified on Mr Cummings and Mr Cain's email accounts when it now appears that such information was held. The CO then explained that this was because there is no "*direct communications*". However, the communications now being considered are where they are copied in.

36. On 22 August 2023, the IC provided the Decision Notice (pages 1-20) in which it was held that the information was exempt from disclosure under section 36(2)(b)(ii) (and 21(1) in relation to a press statement). Section 40(2) was not then considered.

37. The IC also considered the public interest test and accepted that there was a public interest in Mr Cummings' communications in May 2020 due to his position as Chief

Adviser to the Prime Minister. The information which was already in the public domain through press releases was also considered and the importance for public officials to have the freedom to discuss Government communications freely and without fear of premature publication was recognised.

38. The IC also indicated that it had considered the withheld information and concluded that the information would not "*appreciably add to the public interest*" and that disclosure is outweighed by the stronger and wider public interest in providing officials with the freedom to frankly discuss government communications and response to enquiries without the fear of premature publication.

39. The IC determined that the public interest balance lay in maintaining the exemption.

40. The Appellant appealed the IC's decision in relation to the application of the exemption at section 36(2)(b)(ii) and as to whether the information identified was the totality of the relevant information held by the CO.

Witness Evidence

41. The Tribunal has been provided with a witness statement from Ms Lederer, Director of Corporate Services on behalf of the CO dated 21 June 2024 (page 213). Ms Lederer was not personally involved in responding to the Request but was aware of and outlined the background.

42. Ms Lederer referred to official guidance (page 321) and explained that, at the time of the Request, all government officials were obliged to identify information created or possessed by them and which should be retained as a public record and pass them to a records management individual or unit. The guidance was updated in March 2023.

43. She also referred to then Records Management Policies and the Code of Practice on the management of records which refer to information that should be deleted. She considered that destroying material is necessary for the effective management of information as it avoid the unnecessary burden of searching and storing unnecessary material.

44. Ms Lederer explained that email accounts have been subject to short retention periods, with emails over 3 months old being deleted (paragraph 21-page 216/7) save for emails that were actively selected. Prior to 2021, she stated that WhatsApp, Signal and

Slack were not authorised on corporate devices, so there was no separate policy in relation to them (paragraph 22). Whilst Mr Cummings and Mr Cain may use those applications on their personal devices, the CO has no access to them. However, she did add that there is an expectation on government officials to capture any significant information on to government systems.

45. When officials leave their posts, there is a leaving procedure which includes a debriefing. Mr Cummings and Mr Cain left, they were debriefed but not asked to transfer any significant non-ephemeral official information. It would have been left up to them to do so. Ms Lederer confirmed that she is aware that both Mr Cummings and Mr Cain used WhatsApp but she is not aware that they used either Signal or Slack.

46. Ms Lederer then described the efforts made by the CO to retrieve the relevant information required by the Request after the IC's decision notice dated 13 October 2022. At that time, there were no WhatsApp messages or SMS messages that came up following a search for the name "Dominic Cummings" or "Lee Cain" at that time. However, five emails were identified. Ms Lederer referred to those names as being used as search terms and stated that searches were carried out by the Information and Communication Team as "*they have the ability to centrally search individual email accounts, or across the board using specific keywords*".

47. The CO did not contact either Mr Cummings or Mr Cain as they did not consider this to be an exceptional circumstance and they considered that a reasonable search had been conducted and nothing within that information indicated the existence of other communications. Additionally, Mr Cummings had previously been contacted in relation to a FOIA search and he had not engaged. By this point over two years had passed since either of them had left. She confirmed, however, that no WhatsApp messages had been provided to the Covid enquiry for the relevant period by either Mr Cummings or Mr Cain,

Qualified Person

48. Ms Lederer also commented on the qualified person's assessment of the relevant information that had been identified. She agreed that civil servants need to be able to give advice, offer views, draft press statements etc., in a protected environment without risk of those views being disclosed.

49. She explained that she considered that the qualified person felt that the disclosure would have an inhibiting effect on free expression if disclosed and outlines her own view that the relevant information identified is not all connected with the issues that the public would be concerned with. She takes the view that the concerns of the CO about disclosure having a chilling effect on discussions apply but that the public interest justifications do not.

Appellant's Position

50. Within the grounds of appeal submitted by the Appellant, the Appellant does not challenge the application of the section 36 exemption but contends that the public interest in disclosure outweighs the public interest in maintaining the exemption. The Appellant referred in detail to incidents that he describes a scandal during the time of the Coronavirus pandemic lockdown.

51. The Appellant also contends that the relevant information has not been retrieved and doubts whether Mr Cummings and Mr Cain have been contacted to provide the information but that some of the relevant information may have been provided to the Covid Inquiry. He expressed further doubt as to whether the IC had an opportunity to review all the messages.

The CO Position

52. The CO position essentially mirrors that set out in Ms Lederer's statement and contends that the public interest test is in favour of maintaining the exemption. It states (CO letter to IC dated 16 June 2023 – page 195):

> *"It is an important function of the government that it is able to communicate clearly and effectively with the public. .. Officials must …have the confidence that they can work draft statements, give opinions about enquiries and discuss preparations without concerns about premature disclosure."*

Analysis and Decision of the Tribunal

53. The issues for the Tribunal to consider are:

a. Whether the information identified in response to the Request is the totality of the relevant information.

b. Whether the information is exempt from disclosure pursuant to section 36.

c. In the event that the section 36 exemption applies, whether the balance of the public interest lies in maintaining the exemption or in disclosure.

The Information

54. The Tribunal has carefully considered whether the CO had identified the totality of the relevant information. In doing so, it has given detailed consideration to the witness statement of Ms Lederer and notes that there was an obligation on Mr Cummings and Mr Cain to themselves arrange for the storage of any "*emails, text messages, Slack messages, WhatsApp messages, and signal messages*" for the relevant period.

55. Searches were undertaken of the records held and it is noted that only five emails were identified as a result. However, it would appear from the statement of Ms Lederer that the only search terms utilised were "Dominic Cummings" and "Lee Cain". The Tribunal does not consider that these search terms were sufficiently wide and that it is unlikely that those search terms would have identified all the relevant information.

56. The Tribunal considers that appropriate search terms should have included "Cummings", "Dominic", "Cain", "DC", "LC", "Barnard", "Castle" and potentially others.

57. Whilst the Tribunal notes that nearly 5 years has now passed since the date of the information requested or the Request, it is not appropriate for the CO not to have approached Mr Cummings and Mr Cain to request that they provide any relevant information that they may hold in circumstances where it would appear that information otherwise belonging to the CO may have been retained. The Tribunal also considers that the CO did not carry out searches that were sufficiently broad to capture all relevant information that may have been retained.

58. The Tribunal therefore considers that the CO should make enquiries of Mr Cummings and Mr Cain and should carry out further searches including the additional key words suggested above, as well as any other keywords that the CO and its Information and Communication staff consider to be relevant. Thereafter, a statement should be

provided by the relevant person, confirming that they have carried out searches that are sufficiently broad to satisfy them that no further relevant information is held by the CO.

The exemption

59. From the Appellant's submissions, he does not appear to challenge the application of section 36. The Tribunal has also reviewed the five emails provided and carried out its own assessment. The Tribunal's view is also that the disclosure of emails of the type provided would prejudice, the effective conduct of public affairs as such disclosure would inhibit future discussions between officials and between officials and their advisers in future. Therefore, the Tribunal can accept that the opinion given by the qualified person was reasonable.

Public Interest

60. In considering the public interest test, the Tribunal is concerned that it is in the public interest for civil servants and officials to have a safe space in which to discuss matters without risk of those communications being publicly disclosed. It is also necessary for draft documents to be prepared without the fear of publication in order that advice be obtained in relation to them prior to publication.

61. The Tribunal also recognises the public interest in the events of May 2020 and considers that it is appropriate for the public to be aware of the events that occurred, and any justification given. However, having considered the documents, the Tribunal would agree with the view of Ms Lederer that, in the present circumstances, those documents add very little value.

62. Therefore, on balance, the public interest lies in maintaining the exemption.

SUMMARY OF DECISION

63. In summary, for the reasons set out above Tribunal concludes:

    a. the CO has not carried out sufficient searches to ensure that the totality of the relevant information has been provided.

b. the section 36 exemption applies as the opinion given by the qualified person was reasonable.

c. the public interest balance in relation to the five emails that have been provided to the Tribunal in the closed bundle is for the exemption to be maintained.

64. The Tribunal provides the Substituted Decision set out above.

APPEAL

If either party is dissatisfied with this decision, an application may be made to this Tribunal for permission to appeal to the Upper Tribunal, Administrative Appeals Chamber, against decisions of the First-tier Tribunal in Information Rights Cases (General Regulatory Chamber). Any such application must be received within 28 days after these reasons have been sent to the parties under Rule 42 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

Judge R Watkin