



Neutral citation number: [2024] UKFTT 933 (GRC)

Case Reference: EA/2023/0239P

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

Decision given on: 28 October 2024

Before

**JUDGE A. MARKS CBE
MEMBER M. SAUNDERS
MEMBER J. MURPHY**

Between

GEORGE GREENWOOD

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) THE DEPARTMENT FOR CULTURE, MEDIA AND SPORT**

Respondents

Representation:

For the Appellant: the Appellant represented himself

For the First Respondent: Nicholas Martin, Solicitor

For the Second Respondent: Freedom of Information Team at DCMS

Decision: The appeal is allowed.

Substituted Decision Notice: see Confidential Annex provided to the Respondents only

REASONS

Introduction

1. This is an appeal against the Information Commissioner's decision notice IC-181973-J5B8 dated 18 April 2023 which held that the Department for Culture, Media and Sport (DCMS) was entitled to rely on s. 36 of The Freedom of Information Act 2000 (FOIA) (Prejudice to effective conduct of public affairs) to refuse to disclose information requested by the Appellant (GG).
2. All parties agreed to the Tribunal deciding this appeal on the papers rather than requiring an oral hearing. The Tribunal was satisfied, in accordance with Rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended) (GRC Rules), that it could properly determine the issues in this case without an oral hearing.

The request for information, internal review and responses

3. On 9 November 2021, GG emailed DCMS as follows:

"I am sending this request under the Freedom of Information Act.

- (a) Please provide a copy of all correspondence (sent and received) between ministers of your department and Philip Davies MP relating to:
 - a) Gambling regulation
 - b) Entain, formerly GVC Holdings*

Please include emails, texts, WhatsApp messages or messages on equivalent platforms such as Signal, internal work instant messages such as on Slack, Teams or GChat, and a list of and minutes of any calls.

Please also list the titles of attachments to emails or messages within the scope of this request.

- (b) Please provide a record of all meetings between ministers of your department and Philip Davies MP concerning or relating to:
 - a) Gambling regulation or related issues.
 - b) Entain, formerly GVC Holdings.*

Please provide:

- A list of these meetings, including topics.*
- A copy of the minutes recorded of these meetings.*
- A copy of civil service briefings prepared ahead of these meetings for the minister concerned.*
- A list of the titles of any documents considered at these meetings.*

I am happy to limit my request to electronically held records.

Please provide information held from 1 June 2020 to date."

4. DCMS responded on 29 April 2022 (considerably beyond the 20-working day statutory time limit). The response provided some information within the scope of the request with some information redacted to exclude personal data under s.40(2) FOIA.
5. DCMS cited the exemptions in sections 36(2)(b)(i) and (ii) FOIA (free and frank provision of advice, and free and frank exchange of views for the purposes of deliberation) to refuse to provide the remainder of the requested information – comprising the briefing and “*readout*” from a meeting between the Minister for Sport & Tourism (MST) and the All-Party Betting and Gaming Group (APBGG) at which Philip Davies MP was in attendance.
6. GG requested an internal review on 4 May 2022. He mentioned some specific pieces of correspondence and raised some public interest arguments in favour of disclosure of the withheld information.
7. No internal review was conducted so GG complained about this to the Information Commissioner (the Commissioner) on 18 July 2022.
8. The Commissioner contacted DCMS on 1 August 2022 asking it to provide the outcome of its internal review. DCMS failed to do so. As a result, the Commissioner accepted GG’s complaint about DCMS’s handling of his request without an internal review.
9. DCMS later issued the outcome of its internal review on 7 September 2022 (considerably beyond the expected 40 working days maximum). The internal review response said that one letter referenced by GG was out of scope and the other was not held. However, having conducted a further search, DCMS had located additional information to which it applied s.36(2)(c) (prejudice to the effective conduct of public affairs). DCMS otherwise maintained its original position.
10. GG confirmed to the Commissioner that he was content for the Commissioner’s investigation of his complaint to focus on the s.36 exemptions rather than the s.40(2) personal information redactions.

The Decision Notice

11. On 18 April 2023, the Commissioner issued his Decision Notice which in summary concluded that:
 - (a) the exemptions in s.36 were engaged; and
 - (b) the public interest in avoiding the inhibition of the free and frank provision of advice, and free and frank exchange of views for the purposes of deliberation, outweighed the public interest in openness and transparency.
12. The Commissioner also logged DCMS’s delay in responding to the request and DCMS’ further delay in conducting an internal review.

Appeal to the Tribunal

13. On 26 April 2023, GG sent a Notice of Appeal to the Tribunal challenging the Commissioner's decision notice.
14. The basis of the appeal is that the Commissioner wrongly assessed the balance of the public interest. GG argues that there is a strong public interest in disclosure of the withheld material.
15. More specifically, GG stated:
 - (a) The reasoning in the Commissioner's decision notice is generic and does not engage with the real and specific concerns about conflicts of interest between members of the APBGG and the gambling sector in relation to ministers.
 - (b) Many members of the APBGG have received thousands of pounds in hospitality from gambling firms and are amongst their strongest supporters in parliament while some are directly employed by the sector. It is therefore important to see what arguments they are making in private and if they are effectively acting as paid lobbyists for the sector while serving as MPs.
 - (c) The recent revelations about the Chair of the APBGG are relevant and raise very serious concerns about how the APPG operates. It is a good example of the widespread and ongoing concern about the financial benefits received by members of the APBGG and their role advocating for the industry.
 - (d) The Tribunal has previously ruled that those acting as lobbyists cannot reasonably expect their comments to remain private (*Corderoy v Information Commissioner and Department for Exiting the European Union EA/2019/0109 and 0111*)
 - (e) There is a clear public interest in transparency around what MPs who receive benefits from private companies do to support these companies' interests. Given the ongoing gambling review, and the efforts by the gambling industry to try to water down additional liabilities they may face, there is a very strong public interest in transparency about what is being said in such meetings.
 - (f) The Commissioner weighed heavily the potential prejudice that officials and third parties might face. However, GG does not dispute the redaction of the names of junior officials which reduces the weight that can be given to these interests in the balancing test.
 - (g) MPs expect a high degree of scrutiny. MPs in this situation are unlikely to be speaking as experts on a topic but lobbying for an interest from which they have benefitted. As such, the weight must be limited.
 - (h) The decision notice does not explain why in this case disclosure would be particularly harmful. The lack of specific reasoning must weaken the weight given to these arguments.

Commissioner's response to the appeal

16. The Commissioner's response to the appeal on 23 August 2023 in summary states that:

- (a) GG does not challenge the engagement of the s.36 FOIA exemptions, but rather the balancing of the public interest.
- (b) The Upper Tribunal has noted that in conducting the public interest test, the qualified person's opinion is afforded a measure of respect, adding "*No doubt the weight which is given...will reflect the Tribunal's own assessment of the matters to which the opinion relates.*"
- (c) In his decision notice, the Commissioner concluded that the Qualified Person's opinion was reasonable and that the public interests under each exemption favoured maintaining the exemptions.
- (d) The Commissioner resists the appeal, "*broadly maintains*" that the qualified person's opinion is reasonable and that the public interest favours maintaining the exemptions for the reasons set out in the decision notice particularly as, at the time of the request, the gambling review was ongoing and there was a greater need for "*a safe space*" in such circumstances.
- (e) However, on review it is unclear to the Commissioner why the particular information in the correspondence is considered to be exempt by the DCMS compared to other correspondence released in response to the request subject to redaction of personal data. The joinder of DCMS to these proceedings would be of assistance to address this issue.

GG's reply to the Commissioner's response

17. By email to the Commissioner and the Tribunal dated 11 December 2023, GG stated that:

- (a) The only information still outstanding is the minutes of and briefing for a meeting with APBGG about the Gambling Act review.
- (b) If DCMS still wishes to resist disclosure, would the Commissioner state whether he intends to defend his decision notice?

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

Any person making a request 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 this is the case, to have that information communicated to him...

...

Section 2 FOIA: Effect of the exemptions in Part II

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

(a)...

(b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information...*

Section 36 FOIA: Prejudice to effective conduct of public affairs

(1) *This section applies to –*

(a) *information which is held by a government department...*

(2) *Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –*

(a) ...

(b) *would, or would be likely to, inhibit –*

(i) *the free and frank provision of advice, or*

(ii) *the free and frank exchange of views for the purposes of deliberation, or*

(c) *would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*

The role of the Tribunal

18. The powers of the Tribunal in determining appeals against the Commissioner's decisions for the purposes of FOIA are as follows:

s.57 Appeal against notices...

(a) *Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...*

s.58 Determination of appeals

(1) *If on an appeal under section 57 the Tribunal considers –*

(a) *that the notice against which the appeal is brought is not in accordance with the law, or*

(b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

(2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

Evidence

19. Before the hearing, the parties had submitted written evidence. This comprised an Open Bundle of 122 pages (including an Index). The panel also had access to a Closed Bundle with the briefing for, and “*readout*” from, a meeting on 24 February 2021 about the Gambling Act Review held between the MST and APBGG, including Philip Davies MP as a member and previous vice-chair of APBGG.
20. Not included in either the Open or Closed Bundles were the Qualified Person’s opinions (QPOs) dated 29 April 2022 and 6 September 2022 relied upon by DCMS and cited by the Commissioner in his decision notice. The panel therefore asked for these to be provided. They were supplied by DCMS by email to the Tribunal on 9 July 2024 and were shared by the Tribunal with the Commissioner and GG on 22 July 2024.
21. Both the Commissioner and GG were invited by the Tribunal to make observations on the QPOs but neither did so.

Submissions

22. In addition to the submissions before the panel summarised in paragraphs 14-16 above, the Open Bundle included a submission by DCMS in its internal review response to GG on 7 September 2022 that disclosure of the withheld information “*would have a negative impact on our relationship with key stakeholders. We believe these relationships are of great importance in the continued work the department does, and it is therefore not in the public interest that these relationships are undermined.*”

Discussion

Possible unfairness of information being withheld from GG

23. The panel first considered the possible unfairness of the proceedings caused by the withholding of certain information from GG.
24. GG has been provided with only some of the information falling within the scope of his request. The Tribunal permitted other information to be withheld from both GG and the public pursuant to GRC Rule 14.
25. For the purposes of the hearing, the panel was also provided with a Closed Bundle containing the withheld information.
26. The panel takes account of the Tribunal’s Practice Note on Closed Material. This explains that, where disclosure of the disputed information would defeat the object of the exercise, the law permits the Tribunal to deviate from the normal rule about all material seen by the Tribunal being available to all parties. However, such deviation

is permissible only so far as is necessary to ensure that the purpose of the proceedings is not defeated.

27. The panel accepts that there is inevitably *some* prejudice in material being withheld from a party requesting it, but considers that this prejudice is mitigated by:
- (a) the Tribunal's expertise, and exercise of an investigatory rather than adversarial function;
 - (b) the Commissioner being an independent, expert regulator who does not take sides. On the contrary, the Commissioner's role is to point out the strengths and weaknesses of both parties' cases in assessing the correct application of the law and regulations;
 - (c) informing parties excluded from "closed" information as much as possible with maximum possible candour in the written reasoned decision; and
 - (d) in this case, the withheld information includes personal data, which GG says he does **not** seek, and other information about meetings with Ministers which he **does** seek.
28. Having considered all these matters and having carefully read the withheld information, the panel is satisfied that withholding the requested information was and remains necessary to ensure the purpose of the proceedings is not defeated. Moreover, the prejudice to GG's position – mitigated as described above – is justified in the interests of justice overall.
29. For the avoidance of doubt, the panel renews the Tribunal's direction that all withheld information remains confidential under GRC Rule 14 until 35 days after the promulgation of this decision or, if applicable, until the outcome of any appeal against this decision.

The facts

30. The panel went on to consider the relevant facts of this case. Based on all the evidence the panel has seen and heard, the panel makes the following findings of fact. None of these is disputed.
- (a) Some information (comprising various correspondence) was provided in response to GG's request, with personal information having been redacted.
 - (b) During these proceedings the remainder of the requested information was withheld under GRC Rule 14 and will remain so held as indicated in paragraph 29 above.
 - (c) GG does not challenge the exemption relating to personal data under s.40(2) FOIA: the only outstanding issue is therefore the withholding of requested information under s.36(2) FOIA.
 - (d) The QPOs comprise:
 - i. in the case of the QPO (QPO1) dated 29 April 2022, an email from the Minister's private secretary to DCMS colleagues dated 28 April 2022

which said, “MSTCS [the Minister] agrees to the recommendation to apply the exemption and not release the information”; and

- ii. in the case of the QPO (QPO2) dated 6 September 2022, an email from the Minister’s Office to DCMS colleagues dated 6 September 2022 which said, “Thanks again for the sub. MSTHCS [the Minister] is content to apply Section 36(2)(c) exemption to the request.”
- (e) QPO1 was accompanied by an email by DCMS’ FOI Team to the Minister dated 18 April 2022 (Submission 1) and QPO2 by a similar email dated 5 September 2022 (Submission 2).
- (f) Submission 1 was headed “Section 36 Freedom of Information Act 2000 Submission – Briefing, readout and correspondence with Philip Davies and Gambling entity (GVC)”. The introductory paragraph headed “Issue” read “This submission seeks your agreement to apply an exemption to the release of information related to meetings between ministers, Philip Davies, and, a gambling operator, following a request for information under the Freedom of Information (FOI) Act.”
- (g) Submission 1 set out in full GG’s request and included a hyperlink entitled “Briefing of Meetings” (as Annex A) and another hyperlink to “Minutes of meetings” (as Annex B).
- (h) Submission 1 contained no further reference to gambling regulation, the Gambling Act Review, gambling operators or possible conflicts of interest on the part of those participating in the meetings. Rather, the briefing asked the Minister to give his reasonable opinion as to whether releasing the briefing for the meetings at Annex A would be likely to inhibit the free and frank exchange of advice, and releasing the minutes of the meetings at Annex B would be likely to inhibit the free and frank exchange of views under s. 36(2)(b)(i) and (ii). The remainder of Submission 1 simply set out the statutory test and cited general public interest factors favouring respectively withholding of the information and its disclosure. Submission 1 included no advice or guidance as to how the Minister should approach the task of giving a “reasonable opinion”.
- (i) Submission 2 dealt solely with four items of correspondence proposed to be withheld under s.36(2)(c) FOIA. Subsequently, the first two items were withheld as being out of scope of the request – which GG has not challenged – and the second two were disclosed to GG (and are included in the Open Bundle).

Error of law or wrongful exercise of discretion in balancing the public interest

Is there an error of law in the Commissioner’s Decision Notice?

31. Having made the above findings of fact, the remaining issues for the panel in this case were (a) whether the Commissioner made any error of law in his decision notice and (b) whether the Commissioner wrongly exercised his discretion.

32. GG does not suggest there is any error of law but he challenges the Commissioner's exercise of his discretion in applying the public interest test.
33. The panel concludes - in light of its finding of fact in paragraph 30(i) above - that neither QOP2 nor s.36(2)(c) are live issues in this appeal.
34. The panel went on to consider whether the exemptions in s.36(2)(b)(i) and (ii) FOIA are engaged in this case or whether the Commissioner made an error of law in this respect.

Section 36(2)(b) (inhibition of free and frank (i) provision of advice or (ii) exchange of views)

35. To engage s.36(2)(b), a "Qualified Person" must give their reasonable opinion that the exemption is engaged. In this case, the panel accepts that the Minister who gave QOP1 is a "Qualified Person" (for the reasons explained in paragraph 33 above, QOP1 was the only one of the QOPs at issue in this appeal).
36. The panel went on to consider whether the QOP1 was "reasonable". In doing so, we took account of Submission 1 which was made to support the request for such an opinion.
37. The Commissioner's guidance on the s.36 FOIA states that these exemptions depend "*crucially on the qualified person's exercise of discretion in reaching their opinion. This means that they must consider the circumstances of the particular case before forming an opinion...The qualified person should consider the facts in each case... If it is not evident how the provision of advice or the exchange of views would be inhibited, it may be harder to...justify that the opinion was a reasonable one...The issue is whether disclosure would [likely] inhibit the processes of providing advice or exchanging views.*"
38. We note that neither Submission 1 nor QOP1 give any specific examples of **why** and **in what respects** disclosing the information requested in this particular case would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. Nor does either QOP1 or Submission 1 cite any evidence, circumstances, argument or reasons for asserting that the claimed inhibitions would likely arise.
39. While Submission 1 cites various public interest factors, in the panel's view these factors are relevant to the public interest balancing exercise to be conducted once the s.36 exemptions are engaged, a pre-condition of which is a Qualified Person's reasonable opinion. Thus, in the panel's view, generic public interest arguments which do not engage with the factual specifics of the case at issue cannot render the opinion itself "reasonable".
40. In the absence of any specific evidence or circumstances or facts of this particular case nor any reasons why the claimed inhibitions would likely arise were the withheld information to be disclosed - instead referring only to generic "safe space" and "chilling effect" arguments - the panel does not consider QOP1 a "reasonable" opinion

within the meaning of the legislation such as to engage the exemptions in s.36(2)(b)(i) and (ii).

41. When reaching this conclusion, we carefully considered the statutory language of s.36(2): the legislation could simply have provided for the Qualified Person (QP) conclusively to “certify” that in their reasonable opinion the inhibition of full and frank advice/exchange of views would be likely. This would mirror the conclusive certification of the Speaker of the Houses of Commons or the Clerk of the Parliaments in the House Lords under s.36(7). Instead, s.36(2) requires the QP to give a “reasonable opinion” about such an inhibitory effect which is then subject to the public interest test. The panel considers that, in giving a “reasonable opinion”, the exemption envisages – indeed requires – the QP meaningfully engaging with the subject matter of the requested information for the exemption to apply. A minister merely rubber-stamping an official’s submissions containing generic public interest arguments is not in the panel’s judgement sufficient.
42. We therefore consider that the Commissioner’s decision notice was wrong in law in finding that the s.36(2)(b) exemptions are engaged in this case. For the reasons above, we conclude that the minister’s opinion was not “reasonable” and therefore the exemptions in s.36(2) are not engaged.
43. However, in case the panel is wrong about this, we went on to consider the public interest test.

Did the Commissioner wrongfully exercise his discretion in balancing the public interest?

44. The panel acknowledges that if the s.36 exemptions are engaged, the public interest test must then be applied (the absolute exemption conferred by s.36 for information held by the House of Commons or the House of Lords does not apply). Information can be withheld under s.36(2) FOIA only if the public interest in maintaining the exemptions outweighs the public interest in disclosure.
45. The panel considers the general public interest factors in favour of disclosing information and maintaining the exemptions in s.36(2)(b) FOIA include those set out in QOP1 as follows:

In favour of disclosure:

- (a) Increased government transparency which renders government more accountable to the electorate and increases trust.

In favour of maintaining the exemptions:

- (b) Preservation of a “safe space” in briefing documents so officials feel comfortable sharing candid advice when briefing Ministers. Were officials to fear their advice being released under FOIA, they may fail to alert Ministers to all issues relevant to the discussion and leave Ministers unprepared.

- (c) A “*chilling effect*” may apply to meetings because attendees may not discuss matters candidly due to concerns that their views and opinions would be disclosed under FOIA. As a result, they may be reluctant to contribute to meetings or may withhold sensitive but important information.
46. The panel considers that senior civil servants - including those involved in the briefings for and minutes of meetings sought by the request - can be assumed not only to be impartial and robust in their communications but also (as are Ministers and Members of Parliament) fully aware of the likelihood of such information being disclosable in response to FOIA requests.
47. Neither the Minister in QOP1, nor DCMS in Submission 1 explained why, in this case, the claimed “*safe space*” and “*chilling effect*” are relevant. In its response to the appeal, DCMS argued that the gambling review was ongoing at the time of the request and, in such circumstances, there was a greater need for “*a safe space*”. In the absence of further detail or explanation about how or why disclosure of the requested information would cause the inhibiting effect claimed, the panel gave little weight to this argument.
48. For the above reasons, overall we attach little weight to “*safe space*” and “*chilling effect*” arguments that disclosure of the withheld information would be likely to inhibit the free and frank provision of advice or exchange of views.
49. The panel notes that DCMS later argued in its internal review response that disclosure of the withheld information would have a negative impact on its relationship with key stakeholders. No evidence or reasoning is given to support this argument, nor is it clear which stakeholders are being referred to. Given the context, however, the panel presumes that such stakeholders include the members of the APBGG who participated in a meeting with the minister on 24 February 2021.
50. In the panel’s view, members of the APBGG participating in that meeting would have been aware of the likelihood of such information being liable to disclosure under FOIA. Moreover, as MPs or members of the House of Lords, they would be unlikely to be inhibited in their contributions by the possibility of disclosure since they would be well accustomed to public interest and scrutiny of such matters.
51. In addition to the general public interest considerations which favour disclosure - such as transparency and accountability mentioned above - the panel notes that the Commissioner’s response to the appeal does not engage with or respond to the public interest factors raised by GG summarised in paragraph 15 above. The panel attributes particular weight to the considerations in paragraphs 15 (a) to (e).
52. The panel notes the Commissioner’s guidance that the relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Each case must be considered on its facts.

53. In this case, having carefully considered both the content and sensitivity of the withheld information - and DCMS's evidence (both open and "closed") and submissions on the effect of its release - in all the circumstances the panel considers that the public interest favours disclosure of the requested information (subject to redaction of certain personal data) rather than maintaining the s.36 exemptions notwithstanding that disclosing the withheld information:

- (a) raises issues about "safe space" and "chilling effect" which in the panel's view (see paragraphs 47 and 48 above) carry limited weight in all the circumstances of this case;
- (b) may reveal some sensitive - but not, in the panel's view, exempt - information, for example about differing views on gambling regulation and possible options being considered by the DCMS as part of the Gambling Act Review; and
- (c) might expose views expressed by some APBGG members when those views are not necessarily shared by their constituents or fellow Parliamentarians.

Summary of decision

54. While paying due deference to the Minister's opinions and to DCMS's arguments and evidence, for the reasons set out above:

- (a) the panel does not accept that QOP1 is a "reasonable" opinion, and therefore concludes that the s.36(2) FOIA exemptions claimed by DCMS and confirmed by the Commissioner are not engaged; and
- (b) even if the panel is wrong about this, bearing in mind the nature of the information withheld, the panel concludes that the public interest arguments for disclosing the withheld information outweigh the public interest submissions for maintaining the exemptions in s.36(2)(b)(i) and (ii).

Conclusion

55. For the reasons set out above, the panel finds that the Commissioner's decision notice was wrong in law in finding that the exemptions in s.36(2)(b)(i) and (ii) FOIA were engaged; and that he wrongly exercised his discretion in finding that the public interest in maintaining those exemptions outweighs the public interest in disclosure.

56. Accordingly, this appeal is allowed and a substituted decision notice is included in the confidential annex to this decision. The confidential annex will be provided to DCMS and the Commissioner only.

57. The substituted decision notice specifies the information which the panel has determined can be withheld under s.40(2) FOIA (personal information) - which GG does not dispute - and that which must be disclosed. As indicated in paragraph 29 above, however, to allow for the possibility of an appeal of this decision, for 35 days from its promulgation (or, if applicable, until the outcome of any appeal against this decision) all "closed" material shall remain confidential under GRC Rule 14.

Signed:

Date: 25 September 2024

Alexandra Marks

Alexandra Marks CBE
(sitting as a First-tier Tribunal Judge)