**FCO v Information Commissioner and Plowden**
**[2013] UKUT 0275 (AAC)**

## DECISION OF THE UPPER TRIBUNAL
## (ADMINISTRATIVE APPEALS CHAMBER)

As the decision of the First-tier Tribunal (made on the FCO's appeal on 21 May 2012) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must consider afresh whether the Information Commissioner's decision notice was in accordance with law.

B. The tribunal must consider all aspects of the decision notice and not just those matters raised by the FCO.

## REASONS FOR DECISION

### A. History and background

1. Mr Plowden is interested in the decision-making that led to the invasion of Iraq on 20 March 2003. On 11 February 2010, he made a number of requests addressed to the Foreign and Commonwealth Office, which I will call the FCO. He referred to a remark at a public session of the Chilcot Inquiry that there had been 'an agreement with the White House' to 'say that it was the French who prevented us from securing a Resolution' at the United Nations. This agreement was said to have been made during a telephone call of 12 March 2003 between Tony Blair and George Bush, who were then our Prime Minister and the President of the United States. The background was a television interview during which the French President said that he would not support the proposed resolution. Mr Plowden asked for 'the records of that discussion and any comments on it made by FCO Ministers or officials.'

2. This appeal is concerned with a letter that the FCO identified as relevant to this request. I have been told that this is the usual form in which such calls are recorded and the only record of the conversation.

3. In dealing with this letter, the Information Commissioner distinguished between the information provided by Mr Blair to Mr Bush and the information provided by Mr Bush to Mr Blair. He ordered the former to be disclosed, but not the latter. Both Mr Plowden and the FCO exercised their rights of appeal to the First-tier Tribunal. That tribunal broadly agreed with the Commissioner's classification, although it reclassified some of the information. It decided that the information provided by both leaders fell within the qualified exemptions in sections 27(1) and 35(1)(b) and that the information provided by Mr Bush also fell within section 27(2). It then decided that the public interest favoured

disclosure under section 2(2)(b) of the information provided by Mr Blair, but not that provided by Mr Bush.

4. The FCO applied for permission to appeal to the Upper Tribunal. The First-tier Tribunal refused the application, but I gave permission after an oral hearing on 9 January 2013.

5. I held an oral hearing of the FCO's appeal on 20 May 2013. James Eadie QC and Julian Milford of counsel represented the FCO. Robin Hopkins of counsel represented the Information Commissioner. Mr Plowden spoke on his own behalf. I am grateful to all for their arguments.

6. I have been provided with a full copy of the original letter and a copy of the parts of the letter that would be disclosed under the tribunal's decision.

## B. The Freedom of Information Act 2000

7. The relevant provisions of the Act are:

> **1 General right of access to information held by public authorities**
>
> (1) Any person making a request for information to a public authority is entitled-
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.
>
> **2 Effect of the exemptions in Part II**
>
> ...
>
> (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—
>
> ...
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
>
> **27 International relations**
>
> (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—
>
> (a) relations between the United Kingdom and any other State,
>
> (b) relations between the United Kingdom and any international organisation or international court,
>
> (c) the interests of the United Kingdom abroad, or

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

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

**35 Formulation of government policy, etc.**

(1) Information held by a government department ...is exempt information if it relates to—

...

(b) Ministerial communications, ...

## C. Preliminary matters

8. Before I come to my analysis of the tribunal's decision, I wish to deal with two preliminary matters.

*Evidence given in closed hearing*

9. The First-tier Tribunal heard some evidence in closed session in Mr Plowden's absence. At the hearing of the application for permission to appeal, I was shown counsel's record of that evidence. It seemed to me that parts of it could equally have been given in open hearing. I invited Mr Milford, who alone appears for the FCO at that hearing, to consider how much could properly be produced to Mr Plowden and am grateful that this was done in good time for the hearing of the appeal.

10. The First-tier Tribunal should always ensure that: (i) as much evidence as possible is given in open hearing; and (ii) after evidence has been given in closed hearing, the other party is told of any evidence that can properly be disclosed. It is not appropriate for the Upper Tribunal to prescribe how that should be done. It will depend so much on the circumstances of the particular case. But be done it must, if there is to be a fair hearing for all the parties. In ensuring this, the tribunal is entitled to the co-operation of the public authority calling evidence in closed hearing. That is part of the overriding objective, and especially important when part of the case is conducted in secret.

11. I have not set aside the tribunal's decision on this ground, although I could have done so.

*Respect for the First-tier Tribunal's expertise*

12. The Upper Tribunal respects the fact-finding role of the First-tier Tribunal. It does so especially with regard to the specialist knowledge of members of the tribunal. In the case of information rights, the tribunal may contain specialist members. Their judgments on the issues that regularly arise in that jurisdiction will no doubt inform, if not dictate, the outcome of the appeal. Usually, the Upper

Tribunal would be reluctant to interfere in the assessment of the public interest which was, as the tribunal said in this case, finely balanced.

13. But this does not mean that the respect due to the members' expertise is appropriate in all cases. There will be places to which that expertise cannot reach. This is such a case. By its nature, the members will not have had personal experience of the diplomatic consequences of disclosure. The tribunal admitted as much in its reasons when it said that: 'the executive branch of Government has expertise and experience in relation to foreign policy matters as well as security matters which the Tribunal cannot match.' In such a case, the tribunal has to rely more on the evidence and less on its own experience in assessing the balance of the public interest than in the general run of cases. And the Upper Tribunal will be more inclined to interfere with the tribunal's decision on where that balance lies. This is an example of the flexible approach to the scope of error of law and the role of Upper Tribunal, discussed by Lord Carnwath in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19.

14. When the evidence assumes such importance, the tribunal's reasons must reflect that.

## D. How the tribunal went wrong in law

15. I accept Mr Eadie's argument that the First-tier Tribunal made an error of law in its approach to the public interest test. He accepted that the tribunal had undertaken the assessment of the public interest in maintaining the exemptions correctly by asking what the detrimental effects of disclosure might be. But he argued that it failed to do the obverse and ask what the benefits of disclosure might be. I accept his argument that the information that the tribunal ordered to be disclosed was not particularly informative. Given that, the tribunal needed to explain what the public interest was in disclosure that could be set up against the interest in maintaining the exemptions, which it described as 'very high indeed'.

16. I also consider that the tribunal failed to take account of the information as a package. It adopted a sentence by sentence approach. I accept that that was appropriate, but not to the exclusion of looking at the information as a whole. The letter contained a record of a conversation. To isolate one side of the conversation from the other is unrealistic. In my grant of permission I described the information that the tribunal ordered to be disclosed as 'quite innocuous'. On reflection, I made the same mistake as the First-tier Tribunal made. The information may be innocuous if read in isolation and without knowing that it came from a letter containing other information. But if released, it would be known that this was but one side of what was recorded. That could lead to attempts to infer what might be missing. In some cases, that might be possible. In other cases, it would not. In either case, the results of the speculation could cause problems that need to be taken into account when balancing the public interests. The tribunal seems to have lost sight of this in its focus on the individual sentences of the information.

## E. The effect of my decision

17. All parties were agreed that, if the tribunal had made an error of law, I should remit the case for rehearing. I have done so.

18. I need to emphasise that any of the parties may raise any issues on the Information Commissioner's decision notice at the rehearing. The tribunal last year had two appeals before it. I gave permission to appeal only to the FCO. I do not consider that that limits in any way the powers of the First-tier Tribunal on remittal. As the procedure of the Information Commissioner does not comply with Article 6 of the European Convention of Human Rights, there has to be a full reconsideration and not one that is limited by the arguments of the party whose appeal is before the tribunal.

**Signed on original**
**on 16 June 2013**

**Edward Jacobs**
**Upper Tribunal Judge**