IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2013/0074
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice dated 18 March 2013
FS50465400

Appellant: **Brendan Montague**

First Respondent: **Information Commissioner**

Second Respondent: **HM Treasury**

Heard in London on 13 November 2013

Before
John Angel
(Judge)
and
Michael Hake and Steve Shaw

Subject matter: s.3(2) extent of information within scope of FOIA; s.35(1)(a) formulation and development of government policy.

Decision

The Tribunal allows the appeal in part but upholds the Commissioner's decision that no information should be disclosed.

Reasons for Decision

Background

1. Mr Montague's request dated 20 March 2012 (the "Request") was for specified information relating to meetings between the Chancellor of the Exchequer (the "Chancellor") and the former Chancellor of the Exchequer, Lord Lawson, between 12 May 2010 and the date of the Request, as well as information relating to any correspondence between the Chancellor and Lord Lawson over the same period.

2. HM Treasury ("HMT") refused the request on the basis it did not hold any information within the scope of the Request. On 16 May 2012 Mr Montague asked for a review of the decision and by letter date 5 September 2012 HMT explained that it had now identified one document containing information within the scope of the request, namely a transcript of a telephone conversation which took place on 4 September 2011 (the "Conversation"). The disputed information in this appeal comprises the contents of that document. HMT went on to refuse the Request on the basis that some of the information was party political communications and therefore outside the scope of FOIA. The rest was exempt under ss.35(1)(a), 40(2) and 43 FOIA.

3. Mr Montague complained to the Information Commissioner (the "Commissioner") who issued a Decision Notice on 18 March 2013 ("DN"). The Commissioner agreed with HMT on the extent of the information falling within the scope of FOIA and decided that s35(1)(a) FOIA was engaged, as the withheld information related to the formulation and development of government policy. He gave weight to the public interest in disclosure of this information, but concluded that the balance of the public interest favoured maintaining the exemption. His reasoning was summed up in paragraph 22 of the DN as follows:

> *"The Commissioner does however consider that the relevant government policy in this case is still under development and has not been announced or implemented. There is therefore a strong public interest in protecting the safe space for Ministers and officials to be able to develop policy of a live issue away from external scrutiny. The Commissioner also considers that there is a strong public interest in Ministers and officials being able to discuss issues openly and candidly. If the requested information were disclosed whilst government policy is still under development Ministers and officials may be less open in their further discussions. The Commissioner considers that the timing of the request adds significant weight to the public interest in favour of maintaining the exemption."*

4. The Commissioner did not need to consider the other exemptions relied on by HMT.

5. Mr Montague appealed to the First-tier Tribunal ("FTT"). In accordance with the practice in this jurisdiction some evidence remained closed in order not to disclose the disputed information at the hearing and thereby undermine the way FOIA

works but only after the case management process had ensured that as much evidence as possible was made available to Mr Montague to pursue his case taking into account the Practice Note *Closed Material in Information Right cases.* During the closed session, when Mr Montague and his counsel were unable to be present, the FTT performed an investigative function so as to ensure that the FTT had the evidence before it to come to a fair and just decision and which resulted in further evidence being disclosed to Mr Montague.

Issues before the FTT

6. The parties agree that the issues to be decided by the FTT in this case are as follows:
    a. whether any of the withheld information constitutes "environmental information" such that it should have been considered under the Environmental Information Regulations 2004 ('EIRs');

    b. whether the Commissioner was right to decide that some information was not within the scope of FOIA because it was of a purely party political nature and thus not "held" by HMT for the purposes of FOIA ;

    c. whether s35(1)(a) was engaged with respect to the information that does fall within the scope of FOIA; and if so

    d. whether the public interest balance favours disclosure or the maintenance of the exemption; if it favours disclosure of some or all of the disputed information then

    e. whether s40(2) is engaged for any such information.

7. HMT is no longer pursuing the s43 exemption.

Evidence

8. Beth Russell a senior civil servant gave evidence on behalf of HMT. She is the Director of Personal Tax Welfare and Pensions at HMT. From April 2011 to January 2013 she was the Principal Private Secretary to the Chancellor, the Rt Hon George Osborne MP. Prior to this she was the Deputy Director for General Expenditure Policy in HMT, managing the 2010 Spending Review. Under the previous Government she was the Private Secretary and Speechwriter to the Chancellor and Prime Minister, the Rt Hon Gordon Brown MP. She has been a civil servant in the Treasury since July 2000.

9. She explained that the Chancellor's Private Office is responsible for the process by which the Chancellor receives advice from all parts of the Treasury and facilitates the Chancellor's engagement with other Government departments and outside stakeholders on policy issues. In addition to the Principal Private Secretary (her former role), the office

includes, amongst others, four Private Secretaries who are responsible for specific policy areas. Private Secretaries are required to keep abreast of developments in their policy areas so they can effectively commission advice for the Chancellor, and communicate his decisions back to Treasury officials and, where necessary, other Departments. In essence, the Private Office is a bridge between the Chancellor and both other parts of the Treasury and other Government departments.

10. As Principal Private Secretary, she was the head of the Chancellor's Private Office whilst also managing the Private Offices of the other Treasury Ministers and the Treasury's Parliamentary Unit. Consequently, she had a good working knowledge of the workings of the Chancellor's office, in particular in relation to the process by which the Chancellor receives advice. She also had a broad overview of all policy areas the Chancellor was engaged in at the time, although the Private Secretaries led on the detail in their respective areas.

11. At that time of the Conversation the Chancellor also had four Special Advisers who as political appointees are permitted to carry out the kind of political work that civil servants cannot do. They are regarded as temporary civil servants.

12. It is standard practice for transcripts or notes to be taken of the meetings or telephone conversations which the Chancellor takes part in (an example of which is the requested information). Examples include meetings or calls with representatives of industry, other Ministers, Parliamentarians and other stakeholders with whom the Chancellor and the Treasury engage. These would normally be circulated within the Private Office, to both the Chancellor's Special Advisers and to officials in the relevant Treasury policy teams where relevant.

13. The transcripts and notes are important because they record the views of the Chancellor, what exactly he has said to other Ministers and external stakeholders, and the actions he has agreed to. They assist Private Secretaries and individuals in other roles in the Treasury, in the development and implementation of Government policy. They also act as a safeguard against any allegations of impropriety.

14. Ms Russell explained to us that the call between Lord Lawson and the Chancellor on Sunday 4 September 2011 was initiated by the Chancellor and was arranged through the Private Office. She suspects this was because the Chancellor did not have a telephone number for Lord Lawson. He contacted the Private Secretary on duty that weekend to request that the Number 10 Downing Street switchboard arrange the call.

15. The Private Secretary on duty was working from home. She emailed Rupert Harrison (the Chancellor's senior Special Adviser) and Ms Russell to ask if they would like to listen in to the call. Ms Russell did not listen in, and nor did Mr Harrison. He requested that a note be made of the call for his benefit and Ms Russell also asked to be copied into the note, she says,

in case there were any non-political issues discussed, or anything the Private Office would then need to follow-up on. The note of the Conversation was part of an email dated 4 September 2011 and sent at 18.05 by the Private Secretary on duty to the "Chancellor's Action" which is a registry function of the Chancellor's Office and where copy transcripts are kept. There does not tend to be much held in the Registry by way of party political information.

16. Ms Russell has undertaken a search for other relevant emails, with the assistance of Treasury ICT officials, but it appears that those emails are no longer stored.

17. Ms Russell has subsequently spoken to the duty Private Secretary, and Ms Russell understands that she listened in to the conversation between the Chancellor and Lord Lawson, and took a note of it. No one else listened to the call. Ms Russell explained that the duty Private Secretary would normally have listened in to such a conversation and taken a note, she says, unless the Chancellor explicitly said that the call was personal, private or solely party political. For that reason, a note or transcript would normally have been made of the call, regardless of Mr Harrison's request set out above. It would be circulated to those policy units and Special Advisers concerned with any of the areas discussed during a conversation.

18. The transcript of the call in this case was circulated to the immediate Private Office and two of the Chancellor's Special Advisers. It was also circulated to two Private Secretaries who were the leads on macroeconomic and banking policy. Ms Russell says, circulation would have been much wider if the conversation had been viewed by the Private Office as part of the business of HMT rather than being predominately party political in nature. At this stage there was no evidence that the Private Office or Chancellor sought to formally categorise the note of the Conversation as party political.

19. Ms Russell went on to explain that in some cases where a meeting or telephone conversation mixes both party political and policy development material, a note distilling the non-political points (rather than a transcript) may be disseminated to officials in the relevant Treasury policy teams. There is no such note of the Conversation in this case. In other words there is just the transcript as a whole.

20. Ms Russell explained to us the context in which the conversation between Lord Lawson and the Chancellor took place on 4 September 2011.

21. The Coalition Government was elected in May 2010. It faced two immediate challenges: the large public sector deficit, and continuing serious problems in the banking sector following the financial crisis that began in 2007-8.

22. In respect of the deficit, the Coalition Government introduced emergency spending cuts shortly after taking office, which were announced on 24 May 2010. The Chancellor then set out plans for a faster overall pace of fiscal consolidation than was planned by the previous Government, in an emergency Budget on 22 June 2010. The detail of the Government's plans for public spending up to 2014-15 were more fully set out on 20 October 2010 when the results of a comprehensive review of public spending were announced.

23. To address the problems in the banking sector, the Chancellor announced in his Mansion House speech on 16 June 2010 a series of reforms to the system of financial regulation: replacing the Financial Services Authority with a new Prudential Regulator as a subsidiary of the Bank of England and a new independent Financial Conduct Authority, and creating a Financial Policy Committee within the Bank of England to identify the risks to that build up across the financial system as a whole. In addition, he established an Independent Commission on Banking to consider further possible reforms to the sector, principally aimed at addressing the problem that certain banks were considered 'too big to fail'.

24. Turning to Sunday 4 September 2011 the context was as follows. The Chancellor had returned from holiday on Saturday 27th August, and his first day back in the Treasury was Tuesday 30 August 2011. That weekend he was staying at Dorneywood, a residence held on trust for senior Ministers of State and which is currently available for use by the Chancellor.

25. Normally, any call that is part of the business of HMT (such as a call to another country's Finance Minister) would be recorded in the Chancellor's official diary. There are no calls or appointments recorded in the Chancellor's official diary during the whole of the weekend that included Sunday 4 September 2011. Consequently, Ms Russell did not know who else the Chancellor was communicating with on Sunday 4 September 2011. However, given the political context at that time, Ms Russell would not have been surprised if the conversation between the Chancellor and Lord Lawson had been one of a number of political telephone calls made by the Chancellor that day.

26. At this time, the Chancellor would be considering his political and economic strategy for the Autumn. He would also have had an eye on his speech to the Conservative Party conference, which was scheduled from 2 to 5 October 2011, and is always a key focus for September.

27. As to the call the Chancellor did not ask the deputising Private Secretary not to sit in the call and/or not to take notes or circulate them at the time. Ms Russell said to us in evidence that if she had been on duty that day she would have considered the Conversation as a party political matter and not sat in or recorded the call. On 12 November 2013, over 2 years later, she personally spoke to the Chancellor who indicated that the Conversation was a private matter between him and Lord Lawson. At the

internal review the initial reaction (at the refusal notice stage) was to categorise the disputed information as all outside the scope of FOIA on the basis that it was a party political conversation. This was revised at the internal review stage and HMT's position is now that some of the information is within scope of FOIA amounting to more than half of the note of the Conversation.

28. It was explained that the Conversation was about matters of high-level policy, addressing strategic issues at the heart of the Government's economic programme. However Ms Russell considered that the Chancellor was testing views within the Conservative Party (of which Lord Lawson was a senior member and represented a specific wing) before the Conservative Party could finalise its position. But she accepted that now only part of the transcript was party political and this was by reference to the context and by reference to the information itself.

Whether any of the disputed information constitutes environmental information

29. Before considering this evidence in the light of the law Mr Montague asks us to check that none of the information is environmental information because if it is then it is subject to the Environmental Information Regulations 1994 ("EIR").

30. The Commissioner and HMT both consider that the disputed information is not environmental information.

31. We have considered the disputed information and whether it comes within the definition of "environmental information" under regulation 2(1) EIR and have concluded that it does not because it is very largely about fiscal and banking policy and that only FOIA applies in this case. We explain this in more detail in reference to the transcript of the Conversation in the closed annex to this decision.

The scope of FOIA

32. HMT and the Commissioner in particular asks us whether "political" or "party political" information is within the scope of FOIA and what is such information, which as far as we are aware has not been previously considered by the FTT or higher courts and tribunals.

33. FOIA makes no distinction between 'political' and 'non-political' information. However, by section 3(2) FOIA, information is "held" by a public authority (and thus amenable to disclosure under the right of access conferred by s1 of FOIA) where (inter alia) it is "held by the public authority otherwise than on behalf of another person".

34. The Chancellor is both a government official and a party politician. What the Commissioner and HMT say is that insofar as his communications (including with Lord Lawson, a member of his party) are in a party political capacity, the

relevant recorded information possessed by HMT is held on behalf of the Chancellor *qua* politician rather than *qua* government official.

35. Mr Montague argues that the distinction between party political information and government business is not always straightforward: for example, party political considerations will often influence a public authority's policy-making. Having heard the evidence in this case we agree with him.

36. However firstly we have to consider whether there is a need to make such a distinction in this case. What we know is that:

    a. The Private Office arranged the call;
    b. A Private Secretary sat in on the call and recorded what was said;
    c. The Chancellor did not indicate at the time that it was party political and should not be recorded;
    d. A note of the Conversation was distributed to the two Private Secretaries (who as permanent civil servants are required to be politically impartial) who at the time would appear to have been the most appropriate Private Secretaries in HMT to receive the information considering the policy issues covered by the Conversation;
    e. It was also copied to the Principal Private Secretary as well as two Special Advisers;
    f. At no time before the Request was received (some 6 months later) was there any evidence that the Conversation had been categorised in any way as party political and not government business;
    g. Despite the refusal notice there was some disagreement within the Department as to its categorisation as at the review stage HMT found that a large part of the Conversation related to government business;
    h. It is only 2 years later that Ms Russell has expressed a different view and only now that the Chancellor appears to have been consulted on the matter;
    i. Lord Lawson at the time of the Conservation was not only a member of the Conservative Party and House of Lords but had non political/business positions;
    j. Special Advisers are regarded as "temporary civil servants" paid for by HMT;
    k. The Conversation was on high matters of public macroeconomic policy.

37. We also note that there is no set of principles or advice that could be drawn upon to delineate "party political" material from the business of government. The Civil Service Code does not appear to cover this. Moreover there is no common practice among Ministers or civil servants on the recording of such conversations as in this case. There was no evidence that the disputed information was separated in any way and party political material filed separately as belonging to the Chancellor in a private capacity.

38. Taking into account these facts we consider in the circumstances of this case that the disputed information is held by HMT for its own business and not on

behalf of the Chancellor in another capacity despite the interest of Special Advisers. Therefore we find the whole note of the Conversation is within the scope of FOIA.

39. If we are wrong then we need to consider whether there can be a distinction between party political and government information under FOIA.

40. As we have already said FOIA does not make such a distinction as it has done for other categories of information – see for example for those public authorities with special designations under s7 FOIA. As the FTT we should be careful to ensure that we interpret legislation in the way Parliament intended from the language used in a statute.

41. The basis of HMT and the Commissioner's argument is that elected politicians, including Ministers, are not public authorities for the purposes of FOIA. Thus, where the information at issue relates principally to their (party) political purposes, rather than to the business of the department, it will not be "held" for the purposes of s3(2)(a), even if it is in the physical possession of the department. HMT agrees with and adopts the Commissioner's approach to this issue in Decision Notice FS50422276 (concerning disclosure of emails from a private email account used by the SoS for Education) at paragraph 20 (see p.136):

> *"The Act makes no distinction between political information and non-political information. However, the Commissioner considers the nature of the disputed information to be a highly relevant factor when deciding whether the information is held for the purposes of the Act. Political information is still held by a public authority if it amounts to the business of the public authority. Only if the information is "party political", primarily constituting party political activity, can it be classed as private information or personal information, indicating that it is not held on behalf of the public authority. Therefore, the Commissioner has considered whether the content of the email amounts predominantly to party political activity or government activity."*

42. HMT considers that the Commissioner is applying a test of "primacy": One asks whether information is primarily party political, or primarily concerned with departmental business. That test may inevitably require close analysis of "mixed" information, to determine which side of the line particular parts of the information fall. HMT argues that the test is workable and sensible and reflects the fact that much party-political information will touch on departmental business, but cannot realistically be said to be directed at the department's purposes.

43. We note that the Commissioner has provided guidance on whether *"party political communications"* fall within the scope of FOIA in Awareness Guidance No.12 entitled: *"When is information caught by the Freedom of Information Act?"* In section 9 of that Awareness Guidance, the Commissioner addresses the specific question as to

whether *"non-official"* information in the possession of public authorities is caught by FOIA. One example of such *"non-official information"* is stated to be party political communications. The Commissioner explains that (emphasis added):

> *"A common example of party political communications would be emails between councillors which discuss party political matters. In this context the author will be communicating in their party political capacity and the emails would not relate to the functions of the public authority. Subject to the qualification mentioned before, these communications would not normally be held for the purposes of FOI[A]."*

44. The *"qualification"* referred to in this passage is that *"non-official"* communications would not be caught by FOIA (emphasis added) *"provided that the information is not created by a member of staff in the course of their duties"*.

45. Mr Montague's counsel has drawn our attention to the Oxford English Dictionary which defines *"party political"* as *"relating to or involved in party politics". "Party politics"* is in turn defined as *"politics that relate to political parties rather than to the good of the general public"*.

46. Having considered these arguments we accept the proposition which is agreed by the parties that political information falls within the scope of FOIA if it predominantly relates to or amounts to government activity. The dividing line, if there is one, is drawn by reference to whether the information is *"party political"* as opposed to official information (whether political or otherwise).

47. Mr Montague submits that the Commissioner applied the wrong test in determining whether the parts of the disputed information constituted *"party political"* information outside the scope of FOIA and/or the test was incorrectly applied on the facts (to the extent they are known by him) for the following reasons.

48. **First**, the evidence shows that the Conversation between the Chancellor and Lord Lawson took place in the context of a series of important steps or planned steps in relation to high-level government economic policy, and related to "*strategic issues at the heart of the Government's economic programme".* The discussion was about government activity. Any reference to the *"politics of the situation"* is a reference to how that government action would be viewed in the political arena, by the media and the public.

49. **Second**, the disputed note of the Conversation between the former and current Chancellors was generated by the Private Secretary in the course of her duties. There is no reference to this fact in the Decision Notice in this case. The fact that the information was recorded by an important civil servant in the course of her duties is strongly indicative,

if not decisive, of the fact that the information was *"official information"* within the scope of FOIA. It was shared with not only two of the Chancellor's Special Advisers, but also his Private Office. This again does not appear to have been considered by the Commissioner in his DN. There is no indication from Ms Russell's evidence that anyone from the party machine received a copy of the note. The mere fact that both individuals taking part in a conversation are members of the Conservative party is not sufficient to determine that they were in fact speaking in that capacity. What matters is whether in the context of the topics under discussion it is clear that both individuals, in particular in this case the Chancellor as a key member of Government, were giving and receiving advice and/or discussing key public policy issues predominantly in their capacities as Conservative politicians as opposed to any other roles. Lord Lawson occupied at the time of the Conversation and the Request a number of positions such as being a Member of the House of Lords, sitting on the Economic Affairs Committee in the House of Lords and became a Member of the Parliamentary Commission on Banking Standards.

The Tribunal's conclusion

50. Ms Russell's evidence is that in the period leading up to the Autumn Statement and Budget the Chancellor instigated a call with Lord Lawson. It is accepted that the Conversation discussed matters of "*high-level policy, at the macroeconomic level"* and addressed *"strategic issues at the heart of the Government's economic programme".* Mr Montague argues it is a reasonable inference that the Chancellor intended to solicit advice or engage in discussion with Lord Lawson as a former Chancellor and senior politician with significant experience and expertise in economic matters. Ms Russell accepts at least in part that Lord Lawson was speaking in his capacity as a former Chancellor.

51. If we need to consider whether the note of the Conversation contained party political information then we consider we should generally adopt a narrow interpretation of "exclusions" from the Act unless it is clear that Parliament intended otherwise. This is the view the FTT and higher courts have largely taken of the exemptions. Here we do not have an exemption as such but a provision that where a public authority holds information it does not necessarily mean it is subject to FOIA if it is held on someone else's behalf. Clearly we must be satisfied that this is the case.

52. The situation in this case is far from straightforward. Some information is said to be in scope and some out of scope of FOIA. The dividing line is where the information is party political to which we consider a narrow interpretation should be applied. But what happens where the disputed information contains information on both sides of the divide. Here the parties seem to be in agreement by asking us to apply a predominant

purpose test. So if the information is predominantly held for the purposes of government business it is all within scope and if predominantly held for party political business it is all out of scope. The Supreme Court considered such a test in *Sugar v BBC & Another* [2012} UKSC 4 which related to a designation under s7(1) FOIA where Parliament made specific provision for the purposes which were outside the scope of FOIA for particular public authorities. We consider that where the issue at stake is whether information held by a public authority is outside scope the test adopted by the parties and applied to other parts of FOIA would appear to be the approach that Parliament intended and we therefore adopt it.

53. However where there is no predominant purpose the Commissioner argues that we have no alternative but to consider each topic and possibly sentence in turn to decide what is in or not in scope. He suggests this is likely to happen where a number of topics are being discussed and recorded. This would be an onerous task for public authorities, the Commissioner and the FTT.

54. We are not sure this is what Parliament would have intended. Certainly the Supreme Court in *Sugar* seemed to shy away from such a detailed analysis. The basis for the legislation suggests to us that where it is not clear what the predominant purpose is for the holding of information then we should consider it as all within scope of FOIA. Of course that does not mean the information must be disclosed because exemptions can still apply. However in the circumstances of this case our view does not matter as we explain below.

55. In the note of the Conversation taken at the time the Conservation took place there was no clear delineation between party political information and information relating to the business of government. It was only determined there were both types of information at the internal review stage and it would appear that it was only particularised for the hearing in this case. More than half of the note is regarded by HMT as being within scope. We have examined the note in detail and having heard closed evidence we are not convinced that the specific determination by HMT of which parts of the Conversation are party political is correct, taking a narrow approach to this determination. We therefore have no hesitation in finding that the predominant purpose of disputed information was a discussion of government policy and not of party political matters.

56. We asked Ms Russell what checks there were to ensure there would be no abuse of the system to in effect hide government business. She said that if she, as a Principal Private Secretary, considered there was a problem she could speak to the Permanent Secretary who could then speak to a Minister and even the Prime Minister and that would provide the necessary checks. This would not seem to us to be the clearest way to deal with such matters.

57. We now need to consider the exemptions claimed.

Is s.35(1)(a) engaged?

58. The Commissioner and HMT consider this qualified exemption applies to all the disputed information. This exemption provides in relevant part that:

> *Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—*
> *(a) the formulation or development of government policy*

59. This is a class-based exemption, i.e. its engagement does not depend on any harm or prejudice being made out (those being matters for the public interest balance rather than the engagement of the exemptions).

60. The terms "relates to" and "formulation of government policy" can be given a reasonably broad interpretation.[1] This means that the relevant information need not have been created as part of the policy-formulation policy itself; any significant link between the information and the activity suffices. The breadth of these terms is of course not without limit: information on the *implementation* or *operation* of policy would, for example, fall outside s. 35(1)(a) without more.

61. The open evidence sets out the political environment at the time of the Request. The FTT has had the opportunity to examine the disputed information in detail with the benefit of closed evidence and considers that the note of the Conversation covered matters of a high macroeconomic nature at a time when the Coalition Government was formulating and developing its fiscal consolidation and banking policy options. Therefore we find that the exemption is engaged.

62. We need to decide under s.2(2)(b) FOIA whether "*in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*". In order to undertake this public interest test we need to consider the factors in favour of maintaining the exemption and the factors favouring disclosure.

63. We note that where section 35(1)(a) is engaged, this does not carry "inherent weight" in the public interest balance; the scales start with both pans empty.[2]

64. The FTT and Information Tribunal before it has consistently recognised the importance of a "safe space" for Government to formulate and develop policy which has also been recognized by the Upper Tribunal.[3]

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[1] See *OGC v IC* [2008] EWHC 774 (Admin), [2011] 1 Info LR 743 and also *DfES v IC* (EA/2006/0006), [2011] 1 Info LR 689. It should be noted that the FTT is not bound by the latter decision.
[2] see *OGC* at paragraph 79.
[3] See *APPGER v IC & FCO* [2013] UKUT 0560 (AAC) and *Cabinet Office v IC & Aitchison* [2013] UKUT 0526 (AAC)

Public interest factors in favour of maintaining the exemption

65. HMT maintain that at the time of the Conversation and some 6 months later at the time of the Request and then the review the Government was continuing to formulate and develop its policy on fiscal consolidation and banking in a very difficult economic environment and that it needed a safe space to consider policy options. Ms Russell explained the situation to us in her evidence.

66. In the autumn of 2011 there was an on-going political and public debate about the scale, pace and components (tax rises versus spending cuts) of the fiscal consolidation, and its potential impact upon economic growth. The next opportunity to review the Government's fiscal plans was to come on 29 November 2011 in the Autumn Statement, when the Government would review the tax and spending plans it had put in place following its election in 2010, and update both the overall fiscal consolidation plan and the individual components within it for the rest of the forecast period (the following five years).

67. The policy development process for the Autumn Statement begins around two months before the Autumn Statement itself. So the Conversation between Lord Lawson and the Chancellor would have been around a month before the formal process of policy development began. Nevertheless, the Chancellor keeps his policies under review and often has an eye on up-coming fiscal events like the Autumn Statement and the Budget. He would also normally receive initial advice from Treasury officials on the likely economic and fiscal position around two and a half months before the Autumn Statement, so shortly after the Conversation. (Although he would not receive the first official forecasts from the independent Office of Budget Responsibility until later in October).

68. In the autumn of 2011 there were calls for the Chancellor to revisit his spending plans or the pace of cuts in the light of slower than expected economic growth in the preceding 12 months. The pace of fiscal consolidation was proving to be slower than anticipated. There was also a political challenge as to how any future economic policy/decisions might best be presented to Parliament and the public. The Chancellor subsequently made the decision at the Autumn Statement 2011 to extend the period of fiscal consolidation until 2016-17 and to set public spending in 2015-16 and 2016-17 at a lower level than in his original plans. He also reduced the level of current spending in earlier years in order to fund new capital projects.

69. During the spring of 2012, when the Request was made, the Chancellor updated his fiscal plans again in the Budget on 21st March 2012. This included reviewing decisions on the overall level of tax and spending (and the balance between the two) for the following five years; as well as specific decisions on individual taxes (e.g. reducing the top rate of income tax) and spending programmes (e.g. new financing mechanisms for infrastructure spending). Similar decisions have been made at all the fiscal events (Budgets and Autumn Statements) since then.

70. The Government plans to continue cutting the deficit each year until at least 2017-18 and has still to set out some of the detail, especially in terms of how spending will be distributed between Government departments after 2015-16. The Chancellor recently re-stated his fiscal policy at the Conservative party conference in October 2013, and set out a longer-term plan for fiscal consolidation with the vision of running a surplus in the next Parliament, providing the economic recovery is sustained. There is another Autumn Statement due on 4 December 2013 where the Government will review and update its tax and spending plans again in light of the latest economic and fiscal forecast.

71. The Independent Commission on Banking (the "ICB") was in 2010/11 considering the issue of banks and in particular concerns around some being 'too big to fail'. This was in the light of the tens of billions of pounds of public money that had to be used to support the banking sector during the financial crisis.

72. One of the principal problems that the ICB was addressing was the concern that the activities of investment banks might have the potential to infect and even to bring down national retail banks with which large parts of the population did their day-to-day banking. Consequently, the Vickers Report was to recommend a system of 'ring-fenced' banking in the UK. This meant that investment banking and retail banking would be separated into distinct legal entities, such that the problem identified in the previous paragraph would either no longer arise or become less serious.

73. Although the Government did not make its formal response to the Vickers Report until December 2011, the Chancellor would have to prepare a response in the immediate aftermath of its publication on 12 September 2011. This would set the direction for the Government's formal response in December. The Chancellor's approach to the Vickers Report on 12 September 2011 was to broadly welcome its recommendations; and in its formal response on 19 December 2011, the Government ultimately decided to accept the recommendation in respect of ring-fencing. In particular, the Government chose to permit investment banking and retail banking within the same group of companies so long as there were sufficient safeguards within that group of companies relating to the safety of individual group companies.

74. At the time that the Request was made in spring 2012, the Government, having accepted the main recommendations of the Vickers Report, was in the process of considering the next phase of detailed policy in anticipation of legislation. This included consideration of important matters such as the detail of the ring fence separating investment banking and related activities from more traditional personal and business lending.

75. The Government's detailed proposals arising from the Vickers Report were subsequently publicly set out in a White Paper ("Banking reform: delivering sustainability and supporting a sustainable economy"), published on 14 June 2012. These issues remain an area of active policy debate within Government whilst the Banking Reform Bill passes through its various legislative stages.

Royal Assent for the Bill is not expected until early 2014 with the details of the legislation requiring ongoing internal policy work by Treasury officials responding to amendments and issues raised in Parliamentary debate. There will be further policy development and formulation by Treasury officials into 2014 to be reflected in the necessary secondary legislation.

76. At the time of the Conversation, the time of the Request, and to date, the Government's fiscal consolidation was, and remains, a live issue in terms of policy development. The nature of the Government's fiscal consolidation plan is that it is predicated on reducing the deficit and getting debt falling on specific timetables. At each fiscal event, the Chancellor reviews and revisits the scale, pace and components of the plan, reviewing and adapting policy in light of the latest economic and fiscal forecasts.

77. This evidence is largely undisputed by the other parties.

78. Both the Commissioner and HMT argue that in this case there is a very strong public interest in maintaining the exemption under section 35(1)(a).

79. *First,* this was a conversation between the Chancellor and an ex-holder of his post about matters of high-level policy, addressing strategic issues at the heart of the Government's economic programme. The importance of the matters discussed, and the fact that they were discussed at the apex of government, add significant weight to safe space arguments in this case; and make it particularly important that interchanges should be frank, and properly recorded. It is vital to the proper functioning of Government that major current policy issues can be debated by the Chancellor and other Cabinet Ministers with complete candour; and can be debated with persons of commensurate experience, who are in a position to understand the type of choices confronting Ministers.

80. *Secondly,* all the principal topics of the conversation concerned policy which was in the process of formulation both at the time of the conversation itself, and at the time of the Request, which is the relevant point at which to assess the public interest. Safe space arguments are particularly weighty in those circumstances.

81. *Thirdly,* the evidence of Beth Russell is that senior figures from business or politics would be less likely to engage in discussions of this sort with the Chancellor, if they believed the content of those discussions was liable to be released relatively soon after the event. Lord Lawson was approached by the Chancellor for his views. He had no need to speak to the Chancellor. The likelihood of premature disclosure would be a significant disincentive for persons in a similar position to speak candidly. This is often referred to as the "chilling effect". Moreover, Beth Russell's evidence on the point should be given significant weight. Her posts as a Private Secretary and Principal Private Secretary will have given her considerable direct experience of exactly this type of interchange.

82. *Fourthly,* it is of real importance that conversations of this kind should be properly recorded. Beth Russell's evidence, based on many years' experience, is that these type of interchanges would be much more likely to occur "off the record", with detrimental effects to communication across Government (e.g. dissemination of relevant points to Treasury policy teams or other government departments); the functionality of the Chancellor's own office (e.g. the ability of the Chancellor himself or his Special Advisers to refer to past conversations); and the public record. It is not a question of civil servants responsible for keeping the record not doing their job. Senior figures from business or politics who take part in these conversations are much less likely to allow them to be recorded in the first place, if premature disclosure is likely.

83. The Tribunal has had the opportunity to review the disputed information in closed session and considers that the topics discussed related to the economic situation described by Ms Russell and the formulation and development of policies related to it. From the evidence we accept that the formulation and development of policy was continuing at the time of the Request. This we find is a very strong public interest in maintaining the exemption.

84. Mr Montague challenges the strength of this public interest factor on a number of accounts.

85. *Firstly* he says that if any of the disputed information indicates any form of lobbying or impropriety then that would weaken the safe space argument. We would agree but having considered the note of the Conversation in detail we find there is no evidence of lobbying or impropriety. We note that it was the Chancellor who instigated the Conversation and the topics for discussion in this case.

86. *Secondly* he reminds us what other tribunals have been sceptical about the reality of the chilling effect. This scepticism has largely related to discussions within government rather than with outsider stakeholders. In the circumstances of this case we find the chilling effect argument is stronger. It is clearly an important public interest that the Chancellor can consult outside government where the economic situation is so grave, as in this case. Outside stakeholders are not subject to any code like civil servants and therefore may be less likely to engage is such conversations.

87. *Thirdly* Mr Montague argues that record taking would not be affected as has been successfully argued in other cases before the Tribunal. In the circumstances of this case we consider that the HMT argument is weaker. As Ms Russell explained notes are taken in order to ensure that policy teams follow up on any matters needed.

88. Having taken into account Mr Montague's arguments we still consider that the public interest in maintaining a safe space in this case is very strong. The Chancellor needs a safe space to consult with people like former Lord Chancellors on matters of fiscal and banking policy while that policy is

being formulated and developed. The Request was made relatively soon after the Conversation at a time fiscal and banking policy was still very much under consideration. In other words it was still live. The Conversation was related to that policy which was of extreme importance to the country's financial stability. We also consider in the circumstances of this case that there is strength in the argument that disclosure might have a chilling effect on future such conversations. In our view it is a strong public interest that Chancellors should be able to have completely frank and candid discussions with former Chancellors about important macroeconomic matters in the very difficult economic environment which existed in 2011 and still exists to this day.

The public interest in disclosure

89. It is accepted by all parties that there is a general public interest in knowing what policy discussions take place within Government; and that public interest increases, the more important the policy issues, and the more senior the persons speaking. In this case we have policy discussions with a knowledgeable outsider, a former Lord Chancellor. Lord Lawson is a prominent peer, with well-known public views. His prominence adds to the public interest in disclosure.

90. Mr Montague relies upon a number of specific matters which he says increase the public interest in disclosure. Those factors are said to arise either from Lord Lawson's public statements as a "prominent peer"; or from the possibility that he was "lobbying" the Chancellor on behalf of interests he represented; or at any rate from the importance of *"reassuring the public that nothing untoward was discussed"*. Mr Montague has referred us to a number of tribunal decisions on such matters.[4]

91. We have considered the disputed information and in our view there is no evidence of lobbying or anything untoward. We are restricted as to what we can say in this open part of the decision but can say he was consulted on particular aspects of fiscal and banking policy and gave his candid views. However we would again mention that the Conversation was initiated by the Chancellor not Lord Lawson. Lord Lawson is a publically vocal figure and his views on many aspects of fiscal and banking policy are in the public domain.

92. Mr Montague also argues there is an important public interest in favour of disclosing (a) information which will inform public debate; (b) the process of government policy making being transparent; and (c) in knowing about the different individuals and interest groups who have access to the Chancellor.

[4] *DBERR v (1) ICO and (2) Friends of the Earth* EA/2007/0072 and Department for Business, Enterprise and Regulatory Reform v Information Commissioner v Friends of the Earth EA/2007/0072

93. In the DN, the Commissioner accepted that the disclosure of the requested information would enable the public to glean a better understanding of the issues in the policy area in question and would thereby further public discussion and debate (at [20]). Moreover, due to the nature of the withheld information and the subject matter of the potential policy, this also added weight to the public interest argument in favour of disclosure. However, the Commissioner concluded that:

    a. The fact that *"the relevant government policy in this case is still under development and has not been announced or implemented"* meant that there was a *"strong public interest in protecting the safe space for Ministers and officials"* to develop public policy. The *"timing"* of the request added *"significant weight"* to the public interest in favour of maintaining the exemption;

    b. There was a very strong public interest granting Ministers and officials the safe space in which to further develop and discuss the issues surrounding the policy in question.

94. Mr Montague also argues that the public interest in disclosure outweighs the maintenance of the exemption for the following reasons:

    a. The fact that a policy under discussion is still at the formulation stage should not automatically be treated as a significant reason why disclosure should not be granted;

    b. As the subject-matter of the macroeconomic policy discussion addressed *"strategic issues at the heart of the Government's economic programme"*, the importance of the topics under discussion increases the public interest in disclosure.

    c. Lord Lawson occupies a privileged position in that he has been afforded, at the Chancellor's instigation, the opportunity to express his views directly to the Chancellor about important high-level matters of government economic policy. Even if he is not lobbying it is important it is seen that there is no impropriety.

    d. The need for scrutiny of the views expressed by other senior figures to key Cabinet Members is all the greater as they can have a much greater impact on the direction of public policy.

95. We find these are important public interests in favour of disclosure.

Public interest balance

96. We find that the need for a safe space for the Chancellor to have the Conversation with Lord Lawson in the circumstances of this case is very strong for the reasons given above particularly in §88. We accept that

there are public interest factors in favour of disclosure as set out in the previous section. However in the circumstances of this case we consider that these have lesser weight than the need for a safe space. We make this finding largely based on the nature and context of what was discussed between the Chancellor and Lord Lawson and the timing of the Request and later review during a period of significant economic difficulty for the country where the Government has needed to formulate and develop fiscal and banking policies.

97. We therefore find that the public interest in maintaining the exemption outweighs the pubic interest in disclosure.

Personal information

98. As we have found that s.35(1)(a) is engaged for all the disputed information and that the public interest favours maintaining the exemption for all the disputed information we have no need to consider whether s.40(2) applies to any of the information.

Conclusion

99. We allow the appeal in part but uphold the overall decision of the Commissioner that the disputed information should not be disclosed.

100. Our decision is unanimous.

Signed:

John Angel
Judge

Dated: 7 January 2014