First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0072

Decided without a hearing

Before
JUDGE CARTER
ALISON LOWTON
ANDREW WHETNALL

Between

CHRISTOPHER LAMB

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

ATTORNEY GENERAL

Second Respondent

DECISION AND REASONS

1. This is an appeal by Christopher Lamb ("the Appellant") under s.57 of the Freedom of Information Act 2000 ("FOIA") against the Information Commissioner's ("the Commissioner") Decision Notice dated 13 March 2018 ("the DN"). The Appellant had requested information under FOIA from the Attorney General, the Second Respondent.
2. This appeal is not upheld for the reasons set out in this decision.

Background

3. The appeal arose from two requests for information regarding the UK Government's policy towards the crime of aggression, in the context of the Rome Statute of the International Criminal Court ("ICC") as amended in 2010 in Kampala, Uganda ("the Kampala Amendments"). Thus, on 10 and 14 April 2017 the Appellant wrote to the Attorney General and requested information in the following terms:

> *"i) confirmation that the UK's obligations, as a signatory state of the Statute of Rome (International Criminal Court), with respect to the Kampala Amendments for prosecuting acts of state aggression, which come into force in 2017, has strongly informed any recent legal advice having a bearing upon the initiation of military force- whether unilateral or in coalition with other state powers- against another sovereign state;*
>
> *ii) disclosure of the latest legal assessments of how the UK would be affected, as a signatory of the Statute of Rome, under the Kampala Amendments, if its government decided to initiate military force, or join with other powers initiating military force, against another sovereign state out with the conditions laid down by the above mentioned Amendments which determine the lawfulness or legality of such military force;*
>
> *iii) disclosure of any recent legal advice recommending the use of the Kampala Amendments' opt out clause (Article 15) with respect to the exercise of military force which bears the risk of prosecution in the International Criminal Court as 'aggression'."*
>
> *"…I seek…disclosure of all information relating to advice being prepared or submitted to government by the Attorney General's Office concerning any duty or expectation that the UK- as a signatory party to the Statute of Rome- should incorporate 'aggression', as defined by the Kampala Amendments, into UK domestic law, accompanying other war crimes incorporated in such a way. I am also interested in whether this potential advice discusses the issue of incorporating the legal concept of aggression for prosecution retrospectively. [head 4]"*

4. The Appellant clarified that the appeal was only in relation to one head of the requests - head 4, as set out in the last paragraph above. Whilst the Attorney General confirmed/denied the existence of information held in relation to the other parts of the original requests and made limited disclosure, in relation to head 4, the Attorney General refused to confirm or deny whether it held the further information sought, relying on sections 42 and 35(1)(c) and (3) FOIA. The Appellant complained to the Commissioner and after an investigation a DN was issued, upholding the Attorney General's position. The Commissioner considered sections 35(1)(c) and 42 to be engaged and that, in relation to both, the public interest in not confirming or denying whether the information was held outweighed the public interests in so doing (the public interest balancing test).

The Law

5. The general right of access to information held by a public authority provided under FOIA is subject to a number of exemptions contained in Part II of FOIA. Section 1(1) of FOIA provides for a general right to the access of information:

- *Any person making a request for information to a public authority is entitled—*

- *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.

6. Section 35 insofar as relevant provides:

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

(a) ……...

(b) ……...

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) ……...

…….

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

7. Further, section 42 provides:

(1) Information in respect of which a claim to legal professional privilege …could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1 (1)(a) *would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.*

8. Sections 35(3) and 42(2) are subject to section 2(1) which provides:

'Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a)…… or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.'

9. Thus, insofar as the Attorney General decided not to confirm or deny whether he held the information requested under head 4 of the request, the Tribunal must consider the application of the public interest balancing test as set out in section 2(1)(b) above. Thus, the balance is as between the public interests in the exclusion of the duty to confirm or deny as against the public interest in confirming or denying whether the information sought is held.

The Appellant's, ground of appeal, evidence and submissions

10. During the course of the appeal, the Appellant clarified that he was only appealing in relation to the decision not to confirm or deny whether information was held in relation to head 4 of his request for information. His ground of appeal was as to the public interest balancing test in relation to the exemptions claimed in sections 35 (3) and 42 (2) of FOIA. Many of the Appellant's arguments were presented in terms of the public interest in disclosure of the actual information itself (if held), rather than the public interest in confirmation/denial that the information was held.

11. The Appellant argued that he was not asking for any actual legal advice given to Government but rather 'information relating to advice being prepared or submitted to government by the Attorney General's Office'. He stressed that he has asked for that 'prepared **or** submitted', offering the choice to the Attorney General and making it clear that he sought information in preparation **or** the advice as submitted.

12. The Appellant argued that the Commissioner had agreed with him in the DN that there is (see paragraph 34 of the DN) 'a very significant public interest in disclosure'. However, she goes on (see paragraph 44) to state:

> *"In this case the Commissioner's view is that any harm resulting through disclosure of the confirmation or denial would be limited. She does, however, accept that the wording of the request means that disclosure of the confirmation or denial would breach the convention of confidentiality relating to Law Officers' advice and that this means there is a strong public interest in favour of maintaining the exemption."*

13. The Appellant relied upon this to argue that a 'very significant public interest' in disclosure should outweigh a 'strong public interest' in withholding confirmation or denial whether the information is held.

14. The Attorney General had, in relation to the other heads of request, relied upon section 27(1)(a) (information the disclosure of which would, or would be likely to, prejudice relations between the UK and any other State) and (b) (where prejudice would, or would be likely to, occur between the UK and any international organisation or international court.). The Appellant argued that the public interest factors relevant to the application of that exemption read across to those in play in relation to head 4 of the request. He clarified that head 4 was solely concerned with UK legislation and the creation of a jurisdiction for the UK courts (and thereby the definition given to 'aggression' by the Kampala Amendments). It is not, he states, about the UK's relations with foreign powers over the 'crime of aggression'. It was important to note that the 'complementarity' convention was such that the ICC jurisdiction was complementary to, and not prevailing over, national jurisdictions in prosecuting crimes of aggression. Thus, the appeal is about national jurisdiction over the crime and not the exercise of jurisdiction by the ICC itself.

15. The Appellant explained that Article 121(5) of the Rome Statute would be the device adopted to incorporate the Kampala Amendments. This was, he argued, a

controversial option favoured by the UK and a small group of non-ratifying State Parties. A position paper put forward by the UK, France, Canada, Colombia, Japan and Norway at the 16th session of the Assembly of States Parties ("ASP") in December 2017 sought assurances that the amending procedure laid down in resolution RC/Res 6 would in fact be adopted by the ASP. There was no requirement for Ministers to 'develop' or 'alter decisions' nor is there any evidence, he argued, to show that the UK government was prepared to consider any other amending device than the one offered by Article 121 (5). With regard to the assertion by the Attorney General that Government policy on how to approach the jurisdiction and activation decisions at the ASP in December 2017 was ongoing and subject to decisions by Ministers, this was therefore incorrect and in turn, not a relevant factor in determining the weight to be given to the various public interest factors.

16. Most importantly the Appellant argued, in terms of public interest factors in favour of confirming or denying, the UK government position, in pushing for Article 121(5) of the Rome Statute as a device to incorporate these amendments into the Statute, was causing significant harm to the jurisdiction of the ICC. It had, he stated, resulted in the crime of aggression acquiring a different jurisdictional regime than that applying to the other crimes covered by the ICC. As a consequence, it was argued, it had weakened the ICC's jurisdiction and damaged the principle of complementarity which underpins the Court's relationship with State Party national courts. This had in effect created an opt-out system and "turned on its head the intended purpose behind the empowering of the Court to prosecute the crime" which was, he said, to extend jurisdiction over the optimum number of State Parties possible. The public interest therefore lay in the Government revealing whether it held the information requested and thereby whether it continued to have a commitment to viewing 'aggression' as a crime which should be prosecuted when carried out by its own nationals in a domestic court of law. Whether the information was held was said to be key to this issue as it should reveal how seriously this matter was being taken by Government and whether the Government intends to legislate for a crime under this definition to be prosecuted in UK courts.

17. The Appellant argued that this public interest was rendered compelling and one of the greatest public interests possible, given the subject matter, *"namely, war and peace; life and death and the legal deterrence of war mongers"*.

18. The Appellant produced academic articles in support of his assertion that these were weighty matters in relation to which there was a strong public interest, describing amongst other things, the considerable difficulties in according crime status to state aggression and the opposition it stoked up from powerful states.

19. The Appellant also drew the Tribunal's attention to a Ministerial Answer (by FCO minister, Mark Field) dated on 8 June 2018, to a Written Parliamentary Question put by Kerry McCarthy MP, concerning the Government's position toward ratifying the Kampala Amendments stating:

> 'The UK has no plans to ratify these amendments, as we believe that the UN Security Council should be the body responsible for determining when an act of aggression has occurred'.

20. The Appellant argued however that the UN Security Council may be empowered by the UN Charter to determine an 'act' of aggression, but this is not the same as the 'crime of aggression' for which only the ICC, a court of law- international or national- would have competence to prosecute.

21. With regard to section 35(3), the Appellant drew the Tribunal's attention to Mr Justice

Blake in the High Court Appeal of the case, HM Treasury v the Information Commissioner & Evan Owen (2009) EWHC 1811. Although the Judge found that the Tribunal had misdirected itself in failing to 'conclude that Parliament intended real weight should continue to be afforded this aspect of the Law Officer's convention and by failing to conclude that the general consideration of good government underlining the history and nature of the convention were capable of affording weight to the interest in maintaining an exemption, even in the evidence of particular damage, he ruled that the exemption should not be treated as an absolute one .

22. Similarly, with regard to section 42, the Appellant argued that the inbuilt weight accorded to this exemption was not such as to make it an absolute exemption. The Appellant requested the Tribunal to consider the actual harm which may be caused by confirmation/denial, rather than a reliance on the generalities of the privilege.

23. The Appellant refuted that, as asserted by the Attorney General, information already in the public domain was sufficient to generate a 'healthy debate' around the information requested. The position paper put by the Appellant before the Tribunal, the 16th ASP of the ICC (December 2017) was not an example of this 'healthy debate'. The position paper was said by the Appellant to be an *"arcane legal document"* which had not given rise to wide public debate. There was, on the other hand, a niche debate among international law scholars *"many of whom professed bafflement over why the ASP chose Article 121(5) as its amending device when there was no compelling reason to do so in law; when the majority of State Parties at Kampala did not support its use and when it has harmed the Court's jurisdiction"*.

24. In summary the Appellant argued that:

> *"it must be overwhelmingly in the public interest, for the UK government, which still pays lip service to treating state aggression as a crime, to disclose whether it intends to empower its own courts to prosecute this crime. This is even as it opposes any independence for the International Criminal Court to exercise its jurisdiction over the crime. If by refusing to legislate for the crime, it appears to covertly oppose the definition, it is strongly in the public interest that it discloses information about this undeclared opposition."*

Attorney General's evidence and submissions

25. The Attorney General argued in favour of the Commissioner's DN on the basis that the specific and detailed manner in which request 4 is framed meant that confirmation of whether the information referred to is held or not will, in itself, provide information which is exempt. Specifically, any response other than refusing to confirm or deny would disclose not only whether the advice referred to in the head of request was given or not but also (if given) some of its content. This is so, even though the first sentence of request 4 relates to *"information relating to advice"* rather than requesting the advice itself. The last sentence of that request, moreover, directly delves into the content of the advice (if it exists) rather than information provided for its preparation.

26. The Attorney General submitted that section 35 FOIA is the statutory recognition of the public interest in allowing government to have a free space, away from the public view, in which it can debate matters internally with candour and free from the pressures of public political debate. There is therefore a strong public interest in ensuring that a government department can act free from external pressure in deciding what sort of legal advice it obtains, at what stage, from whom, and in particular whether it should seek advice from the Law Officers. This strong public interest is reflected in the long-standing Convention, observed over many years and

by successive Governments, that neither the advice of Law Officers, nor the fact that their advice has been sought, is disclosed outside government. This Convention is recognised in paragraph 2.13 of the Ministerial Code:

> *"The fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside Government without their authority."*

27. The Attorney General argued that the purpose of this Convention, as recognised in section 35(1)(c) FOIA, is to provide a guarantee that Government business will be conducted in a way that facilitates fully informed legal advice, where Ministers and the Law Officers are completely open with each other. This protection of the confidentiality of the conditions in which legal advice is sought in turn allows the Law Officers to discharge their responsibility to advise the Government on complex legal matters, and supports the Government in acting within the rule of law. The Convention is also said to be important insofar as it promotes democratic accountability, by ensuring that the focus of public scrutiny and debate is on a decision taken collectively by the elected Government, rather than on the internal process by which that decision is reached. The Attorney General submitted that *"the great weight"* to be given to this public interest is confirmed in the *Evan Owen* judgment.

28. In respect of the s. 42 (2) exemption, the Attorney General followed in effect the same analysis: that there is a *"strong element of public interest inbuilt into the privilege itself"* (see *Bellamy*). It was submitted that this also was reflected in the Convention.

29. The strong public interest in disclosure of the information sought, given the subject matter and issues which surrounded it, was acknowledged by the Attorney General. However, he argued that the underlying issues (the crime of aggression and the UK's position) have been the subject of public discussion and academic analysis. A "healthy debate" had already taken place without the information requested which was not essential to this debate.

30. Insofar as the Appellant had further asserted that the withheld information did not relate to a 'live' process, this was said to be incorrect. As at date of the request, the resolution in question had not yet been passed and discussions about the Kampala Amendments were ongoing.

The Commissioner's submissions

31. The Commissioner's submissions broadly supported those of the Attorney General above. In addition, the Commissioner noted the difference in wording in the DN and the Appellant's arguments with regard to the public interest balancing test: Paragraph 26 of the DN refers to a "*significant public interest in disclosure*", paragraph 27 refers to a "*weighty public interest in disclosure*", paragraph 34 refers to a "*very significant public interest in disclosure*". These conclusions however related to the exemptions relied upon for non-disclosure of the information sought under the other heads of request, not head of request 4. The Commissioner argued that the balancing exercise under the public interest test was correctly applied individually in relation to each exemption which is engaged. Therefore, the Appellant is misconceived to balance the public interest in favour of disclosure under one exemption against the public interest in favour of maintaining the exemption under another exemption.

32. Only the paragraph 40 conclusion as to *"weighty public interest in disclosure"* related to head 4. These were to be compared with the Commissioner's conclusion at

paragraph 44 of the DN, relevant to the refusal to confirm or deny in relation to head of request 4, that there was a "*strong public interest in favour of maintaining the exemption*" in relation to reliance upon section 35 FOIA. There was no inconsistency, it was argued, as between these two phrases.

33. With regard to section 35, the Commissioner made the additional point that the Appellant had demonstrated just a general public interest in the disclosure of the requested information. Moreover, it was argued that the suggested public interest would apply in relation to any controversial or topical decisions taken by government. As such, the Commissioner did not consider this to be sufficient to outweigh the public interest in not confirming or denying in this case.

34. The Commissioner argued in relation to section 42 that public authorities are entitled to freely exchange views on their legal rights and obligations with those advising them without fear that such information may be disclosed, and that this was the case except in the *"most clear case"* (*Bellamy and Secretary of State for Trade and Industry* EA/2005/0023 at §35). This was not to elevate section 42 to an absolute exemption, rather, in this case it was argued that there is not such a clear case, rather a general case which would apply in the majority of situations concerning controversial or topical decisions taken by government. This was not, in the Commissioner's view, sufficient on the facts of this case to outweigh the strong public interest in maintaining the exemption.

Decision

35. The Appellant had not, in terms, challenged the engagement of the two relevant exemptions, section 35 and 42. However, the Appellant had raised one argument with regard to the scope of the request and therefore, by implication the engagement of the two exemptions. Thus, the Appellant had argued that head 4 of the request was not calling for legal advice insofar as it referred to "*disclosure of all information relating to advice being prepared* ***or*** *submitted to government by the Attorney General's Office" [emphasis supplied]*. It was clear, in the Tribunal's view however, that confirmation or denial of information held further to this request would bear directly on and be within the scope of the the Convention. So whilst the Tribunal considered that, under section 42, at least in the terms of the request being *"relating to advice being prepared"*, certain of the information sought might have gone beyond that potentially subject to legal professional privilige, it was satisfied that all of the information sought, if it existed and if disclosed, would be subject to section 35(1).

36. Apart from this, the grounds of appeal were with regard solely to the application of the public interest balancing test as to the Attorney General's decision not to confirm or deny whether information was held further to head 4 of the request. Relevant to both exemptions, the disparity in phraseology used in the DN did not persuade the Tribunal that the Commissioner had incorrectly applied the public interest balance. The Commissioner had been entitled to view the public interests in disclosure differently as between the application of different exemptions to different heads of request. In any event, as will seen be below, the Tribunal formed its own and different view as to the appropriate weight to be given to one of the factors (the public interest in the underlying subject matter), which in effect answers this ground of appeal.

37. Of crucial relevance to both exemptions were the arguments of the Appellant that there was a strong or weighty public interest in the underlying subject matter, that is the issues underlying the request given the seriousness of the context in which the Kampala Amendments arose – this being a public interest factor in favour of confirming or denying. It was said that the Government's position with regard to

domestic implementation of a crime of aggression and thereby the complementarity principle, were of major importance both in the domestic and international sphere. The Commissioner had regarded the subject matter as giving rise to a weighty factor in favour of disclosure of the confirmation or denial.

38. The subject matter of head 4 of the request was, in the Tribunal's view, clearly of some considerable public importance, heightened by the fact that, as the Appellant had argued and the Tribunal accepted there had not, on the evidence before it, been much public debate around these issues. Relevant as it was to war, international aggression and criminal justice, these matters clearly commanded public interest in knowing the Government's position and by extrapolation whether it had sought legal advice from Law Officers in this regard (that being arguably an indication of the seriousness with which the Government treated these issues).

39. The importance of the public interest in the subject matter was not, in the Tribunal's view, diminished by the assertion that these were live issues. As at the date of the request, on the evidence before it and available in the public domain, it appeared that the Government's fundamental position with regard to the Kampala Amendments appeared to be essentially settled. That said, the Tribunal did not consider that there was a public clamour for more information on the domestic aspects of this matter and whilst there had not been an extensive debate in public nor was there a demonstrable call for more information to be placed in the public domain.

40. Moreover, whilst the Tribunal agreed with the Commissioner's assessment of the public interest in the subject matter, this only went as far as his assessment in relation to the other heads of request. Thus, at the macro, international level and as to whether the UK should have or should ratify, the subject matter was of strong public importance. This included the asserted damage to the jurisdiction of the ICC and issues around whether the UN should have the primary role in determining what are acts of aggression. Head 4 of the request, however concerned the domestic position and the implementation of a crime of aggression would only arise if the UK did decide to ratify. As such, the subject matter of the information sought under head 4 was of subsidiary importance given the UK's clear stance that it would not ratify the Kampala Amendments. Thus, in the Tribunal's view this commanded less public interest than was being asserted. The Tribunal accorded this a level of public interest below what could be described as "weighty".

41. On the other hand, and in relation to section 35, the Tribunal accepted the arguments of the Respondents that there was a strong public interest in preserving and not undermining the Convention of confidentiality in relation to Law Officers' advice. This Convention provided a guarantee that government business may be conducted in a way that enables the provision of full legal advice and an open discussion between ministers and their legal advisers. The Convention further promotes democratic accountability, in taking the focus away from the advice itself and allowing debate and scrutiny to be on the decisions actually taken by elected Government. The apparent harm in this specific case in confirming or denying whether any actual information was held, did appear limited (by reference to its potential content), whereas it was the case that the confirmation or denial would breach and therefore, in the Tribunal's view, undermine the Convention. Given the Tribunal's assessment as to the public interest in disclosure being below the level of "weighty" and set against the considerable importance of the Convention and the inevitable degree of undermining that would flow from confirmation or denial, the Tribunal concluded that the Attorney General and the Commissioner in turn had reached the correct conclusion in this regard.

42. With regard to section 42, the Tribunal accepted the arguments of the Commissioner and the Attorney General that head 4 of the request was worded in a detailed way and confirmation or denial would reveal certain of the scope and/or content of any legal advice if held. With regard to the balance of the public interests, the Tribunal took into account the general public interest in the openness and transparency of the functioning of the Attorney General's Office and the public interest in the maintenance of legal professional privilege, as well as those factors that applied in relation to the specific information requested.

43. It is well established in law, that the Tribunal is bound to have regard to the inbuilt public interest in the maintenance of legal professional privilege (*Bellamy).* Whilst not to be elevated to the level of an absolute exemption (*DBERR v Dermod O'Brien* (EWHC 164 (QB)) this is a weighty factor in favour of maintaining the exemption.

44. In conclusion then, the Tribunal agreed with the Commissioner and the Attorney General in their decisions that, albeit with different reasoning, the Tribunal having determined the public interest in the underlying subject matter of the information sought was at a level below *"weighty"*, that the public interests in the exclusion of the duty to confirm or deny was not outweighed by the public interest in confirming or denying whether the information sought is held.

45. For the reasons above, the Tribunal unanimously dismissed the Appeal.

Signed

Judge of the First-tier Tribunal
Date: 19 October 208

Promulgation date: 22 October 2018