Neutral Citation Number: [2023] EWCA Civ 1378

Case No: CA-2022-001875

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
UPPER TRIBUNAL JUDGES WIKELEY, WRIGHT AND CHURCH
UA-2020-000324-GIA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2023

Before:

LORD JUSTICE BEAN
LADY JUSTICE ANDREWS
and
LORD JUSTICE LEWIS

- -

Between:

THE DEPARTMENT FOR BUSINESS AND TRADE	**Appellant**
- and -	
(1) THE INFORMATION COMMISSIONER	**Respondent**
(2) BRENDAN MONTAGUE	

- -
- -

Sir James Eadie KC and Robin Hopkins (instructed by the **Government Legal Department**) for the A**ppellant**
Peter Lockley (instructed by the **Information Commissioner**) for the **First Respondent**
Christopher Knight and Sam Fowles (instructed **by Leigh Day**) for the **Second Respondent**

Hearing date: 3 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the proper interpretation of section 2(2) of the Freedom of Information Act 2000 ("FOIA"). Any person making a request for information to a public authority is entitled under section 1(1)(a) of FOIA to be informed by the public body if it holds the information and under section 1(1)(b) "if that is the case, to have that information communicated to him". Section 1(1) is made subject to section 2, the material provision of which provides:

> "(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

2. In the present case, the second respondent, Mr Montague, requested information about trade working groups established by the appellant, the Department for International Trade, now the Department for Business and Trade, ("the Department") in the period prior to the withdrawal of the United Kingdom from the European Union. The Department refused to disclose the information relying on the public interest arising from two provisions in FOIA, section 27 which provides that information is exempt if disclosure would be likely to prejudice international relations, and section 35 which provides that information is exempt if it relates to the formulation of government policy.

3. The sole issue that arises on this appeal is whether the public interest recognised in two or more different statutory provisions exempting information should be assessed in combination or "aggregated" in determining whether that public interest outweighs the public interest in disclosure? Or is the public interest recognised in each provision to be weighed separately against the public interest in disclosure?

4. The First-tier Tribunal (His Honour Judge Shanks, Stephen Shaw and Pieter de Waal) ("the FTT") held that the public interest in different exemptions could be aggregated and concluded that the public interest recognised in sections 27 and 35 of FOIA together outweighed the public interest in disclosure of the minutes of the trade working groups. The Upper Tribunal held that FOIA did not permit the aggregation of separate public interests in non-disclosure. Rather, the public interest recognised in each individual statutory provision exempting information had to be weighed separately against the public interest in disclosing the information.

5. The Department appeals against the decision of the Upper Tribunal. Mr Montague and the first respondent, the Information Commissioner ("the Commissioner") submit that the Upper Tribunal was correct.

THE STATUTORY FRAMEWORK

6. FOIA provides a scheme for the disclosure of information held by public authorities. Part I of FOIA is headed "Access to Information held by public authorities" Section 1(1) and (2) provide as follows:

> "**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) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

7. Section 2 is in the following terms:

> **"2.— Effect of the exemptions in Part II.**
>
> (1) 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 where either—
>
> (a) the provision confers absolute exemption, 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.
>
> (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
>
> (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
>
> (a) section 21,

(b) section 23,

(c) section 32,

(d) section 34,

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords,

(ea) in section 37, paragraphs (a) to (ab) of subsection (1), and subsection (2) so far as relating to those paragraphs,

(f) section 40(1),

(fa) section 40(2) so far as relating to cases where the first condition referred to in that subsection is satisfied,

(g) section 41, and

(h) section 44."

8. Part II of FOIA is headed "Exempt Information". It contains a series of sections providing that in certain specified circumstances information is "exempt information". The material sections in the present appeal are sections 27 and 35 which provide, so far as material, that:

"**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.

(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

(4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)—

(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(5) In this section—

"international court" means any international court which is not an international organisation and which is established—

(a) by a resolution of an international organisation of which the United Kingdom is a member, or

(b) by an international agreement to which the United Kingdom is a party;

"international organisation" means any international organisation whose members include any two or more States, or any organ of such an organisation;

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom."

and

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

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

(a) the formulation or development of government policy,

(b) Ministerial communications,

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

(d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

…..

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section—

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Government;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General to the Welsh Government and the Attorney General for Northern Ireland ;

"Ministerial communications" means any communications—

(a) between Ministers of the Crown,

(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

(c) between members of the Welsh Government,

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the Cabinet or any committee of the Cabinet of the Welsh Government;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the Welsh Government providing personal administrative support to the members of the Welsh Government;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.

9. Section 17 of FOIA (which appears in Part I) deals with a refusal of a request by a public authority. The material parts provide:

> "**17.— Refusal of request.**
>
> (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which
>
> (a) states that fact,
>
> (b) specifies the exemption in question, and
>
> (c) states (if that would not otherwise be apparent) why the exemption applies.
>
> …..
>
> (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—
>
> (a) that, 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 authority holds the information, or
>
> (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

10. Part IV of FOIA deals with enforcement. Section 50 provides that a person may apply to the Commissioner for a decision on whether a request has been dealt with in accordance with the requirements of Part I of FOIA. The person making the request is referred to in FOIA as "the complainant". The Commissioner may, amongst other things, serve a notice of his decision on the complainant and the public body concerned.

11. Part V of FOIA deals with appeals. Section 57 of FOIA provides for a right of appeal by a complainant or public authority against a decision notice served by the Commissioner. An appeal may simply be allowed or a different decision notice may be substituted (see section 58 of FOIA).

THE FACTUAL BACKGROUND

The Request for Information

12. Mr Montague is a journalist. He made a request to the Department for information concerning trade working groups established in advance of trade negotiations with other countries following the withdrawal of the United Kingdom from the European Union. The request included information on the existence of the various groups, their membership, the dates of meetings, the agendas and the minutes of meeting. The Department disclosed some information but refused, amongst other things, to disclose the minutes of the meetings of trade working groups, relying on the fact that the minutes were exempt information within the meaning of sections 27(1) and (3) and 35(1)(a) of FOIA.

The Decision of the Commissioner

13. Mr Montague was dissatisfied with the response and made a complaint to the Commissioner. By a decision notice dated 29 March 2019, the Commissioner first decided that the information was exempt information by reasons of section 27(1)(a), prejudice to relations between the United Kingdom and another state, 27(1)(c), the interests of the United Kingdom abroad, and section 27(2), confidential information obtained from a state. The Commissioner then considered the public interest and concluded at paragraph 46 of his reasons that:

> "The Commissioner finds that the public interest in maintaining the exemptions at sections 27(1)(a), 27(1)(c) and 27(3) outweigh the public interest in disclosure of the withheld information."

14. The Commissioner then went on to consider section 35(1)(a) of FOIA. He decided first that the information was exempt information by reason of section 35(1)(a) as it involved the formulation of governmental policy. The Commissioner then decided that the "public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in the disclosure of this information".

The FTT

15. Mr Montague appealed to the FTT. His appeal in respect of the dates and agendas of meetings, information about establishing new trade working groups and a schedule of forthcoming meetings was allowed and the Department was required to supply that information. There is no need to mention this aspect further.

16. The other aspect of Mr Montague's appeals concerned the minutes of meetings of trade working groups. The FTT considered sections 27 and 35 together. At paragraph 11 of its reasons, the FTT indicated that the FTT had during submissions raised:

> "the issue of "aggregation", that is whether the public interest in maintaining different exemptions in relation to one piece of information should be aggregated".

17. The FTT decided that it proposed, so far as it might be relevant, to apply what it called the aggregation principle in this case. The FTT concluded that the minutes of the trade working groups were exempt information as they fell within sections 27 and 35. It then considered the public interest in maintaining the exemption against the public interest in disclosure. It is agreed that the FTT considered the aggregated, or combined, public interest recognised in sections 27 and 35. It concluded that:

> "113. It is necessary to balance the likely prejudice to foreign relations (and in particular to the requirements to comply with the obligations of confidence) and in policy development which would have resulted from disclosure of the contents of the withheld material against the public interest in its disclosure as at March 2018, bearing in mind that the material concerns a range of foreign states and includes a whole range of information. We have considered the matter in light of the whole context set out above, in particular, the content of the withheld material, the timing of the request and that factors that we identified in our discussion of the public interests.
>
> 114. Having debated the matter we have come to the view ….. that the public interest in maintaining the exemptions narrowly outweighed the public interest in disclosure of the withheld material in so far as it consisted of minutes of the [trade working group] meetings…..".

The Appeal to the Upper Tribunal

18. Mr Montague appealed to the Upper Tribunal. At paragraph 2 of its decision, the Upper Tribunal (Upper Tribunal Judges Wikelely, Wright and Church) identified two issues, the first of which is of concern in the present appeal. The Upper Tribunal identified the issue in the following terms:

> "whether, when multiple FOIA exemptions are engaged by a single piece of information, the separate public interests in maintaining those different exemptions may be aggregated when weighing them against the public interest in disclosure ("the Aggregation Issue")."

19. The Upper Tribunal concluded that aggregation was not permitted, stating its conclusion at paragraph 4 in these terms:

> "4. As to the Aggregation Issue, we conclude that FOIA does not permit aggregation of the separate public interests in favour of maintaining different exceptions when weighing the maintenance of the exemptions against the public interest which favours disclosure".

20. The Upper Tribunal's essential reasoning came in paragraphs 24 to 26 of its decision and is in the following terms:

> "24. The starting point is that section 1(1)(b) of FOIA confers a right ("is entitled") for a person to have information sought by them provided to them if it is held by the public authority *unless*, inter alia, it is exempt information under Part II of FOIA. Given the general and important constitutional right conferred by section 1 of FOIA, we consider that statutory cutting down of that right as set out elsewhere in FOIA needs to be carefully construed. The language of the Act should, where possible, be

> construed broadly and liberally in the context of FOIA's statutory purpose to make provision for the disclosure of information held by public authorities in the interests of greater openness and transparency: see *University and Colleges Admissions Service v Information Comr* [2015] ELR 112, paras 35 and 39 and, albeit in a different context but to similar effect, paras 2 and 68 of *Dransfield v Information Comr* [2015] 1 WLR 5316 .
>
> 25. The critical words, in our judgment, are those which appear in section 2(2)(b). These words are that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". The words we have underlined in section 2(2)(b) establish, in our view, the intention of Parliament that the public interest has to be in maintaining the exemption singular, not the public interest in maintaining exemptions in the plural. That, it seems to us, is the plain meaning of the wording used in the section when read alone and when read in the context of the rest of FOIA. Moreover, we are inclined to accept that aggregating the public interests against disclosure is likely to inhibit disclosure when compared to considering the public interest against disclosure in respect of each individual exemption, and thus is a pointer against reading aggregation into the Act as it would offend against the liberal reading of FOIA we have highlighted above.
>
> 26. We do not consider that the opening wording of "in all the circumstances of the case" in section 2(2)(b) alters this conclusion. The case may involve one exemption under Part II or several exemptions, and in each case all the circumstances of the case must be considered. But in each case the circumstances of the case that have to be considered are qualified by the words which immediately follow the comma, namely whether the public interest in maintaining the exemption outweighs the public interest in disclosing. The case, as we have said, may only involve one exemption or it may involve more than one exemption, but the circumstances of the case need to relate to whether the public interest in maintaining the exemption, or each exemption separately where there is more than one exemption in issue, is outweighed by the public interest in disclosing the information in that context. If section 2(2)(b) had been intended to permit aggregation of the public interests (plural) in favour of maintaining the exemptions then we would have expected clearer language to have been used to this effect, such as "the public interest in maintaining the exemption or, where applicable exemptions, outweighs the public interest in disclosing the information".

21. The Upper Tribunal also considered that that interpretation of section 2(2)(b) of FOIA read more consistently with section 17. It considered that the language of "the exemption" in section 17(3)(b) of FOIA remained the same as in section 2(2)(b). The

Upper Tribunal also rejected the Department's argument that section 6(c) of the Interpretation Act 1978 ("the 1978 Act") applied so as to require "exemption" as including exemptions. It said this at paragraph 29 of its reasons:

> "29. We reject the [Department's] argument that section 6(c) of the Interpretation Act 1978 applies so as to read "exemption" as including "exemptions". Section 6(c) does not apply in our view because the structure of section 2 of FOIA provides the "contrary intention" under section 6 of the Interpretation Act. We agree with the Information Commissioner that the better reading of section 2(2) of FOIA, is that, properly construed, it sets out a structured approach which involves the public authority deciding each applicable exemption separately, starting with any absolute exemption: per section 2(2)(a). It is perhaps instructive that the statutory language in section 2(2)(a) is also focused on each applicable singular absolute exemption: "is exempt information by virtue of a provision conferring absolute exemption". We recognise, of course, that in the case of an absolute exemption one will suffice to deny the applicant the information and no public interest balance is in play. That lessens, to an extent, the support which section 2(2)(a) may give to our reading of section 2(2)(b), but the choice of "a" and "the" in the two subsections does, we consider, put a focus on the singular rather than on any or all applicable exemptions. If no absolute exemption applies the public authority needs to consider, sequentially, the public interest in maintaining each qualified exemption that is engaged and balancing that exemption-specific public interest against the public interest in disclosure."

22. Finally, the Upper Tribunal rejected an argument that section 2(2)(b) of FOIA ought to be interpreted consistently with regulation 12 of the Environmental Information Regulations 2004 ("the EIR").

23. The Upper Tribunal therefore considered that the FTT erred in its consideration of the matter as it had aggregated the public interests underlying sections 27 and 35. Further, the Upper Tribunal considered that the FTT had made a further error in its interpretation of section 35. The matter was remitted to the FTT. That tribunal will need to consider the issue concerning section 35 in any event. The sole question on this appeal is whether the FTT can aggregate the public interest reflected in the different statutory provisions that it finds applicable.

THE APPEAL AND SUBMISSIONS

The Grounds of Appeal

24. The Department appealed on the following grounds.

> "Ground 1: the UT concluded that the aggregation approach advocated by the [Department] was contrary to a purposive interpretation of FOIA. That is wrong: the [Department's] approach is consistent with, and indeed supported by, a

> purposive interpretation of FOIA. In contrast, the UT's approach is liable to lead to a failure to weigh the overall public interest in preventing the harms at which exemptions are aimed: this cannot have been the intention of Parliament.
>
> Grounds 2: the UT erred in its interpretation of the language of FOIA, in that:
>
> The UT interpreted "exemption" as being synonymous with "a provision of Part II" of FOIA. That is wrong: "exemption" refers to the exempt status of information, as conferred by the provisions of Part II of FOIA.
>
> The UT concluded that FOIA, and particularly, section 2 FOIA, contained the "contrary intention" required for displacing the principle under section 6(c) of the Interpretation Act 1978 that words in the singular include the plural and words in the plural. That is wrong: FOIA contains no such contrary intention.
>
> The UT concluded that there were sufficient reasons why the approach to aggregation required under FOIA should be the opposite to that required under the Environmental Regulations 2004 and Directive 2003.4.EC."

25. In substance, as all parties recognised, the sole issue was the proper interpretation of section 2(2) of FOIA. The different grounds of appeal reflected different strands of argument about how that provision should be interpreted. The grounds of appeal can conveniently be considered together.

The Submissions

26. Sir James Eadie KC, with Mr Hopkins, for the appellant, submitted that section 2(2)(b) of FOIA should be interpreted as permitting the aggregation of the different aspects of the public interest reflected in the different provisions of Part II of FOIA for, essentially, the following reasons. First, section 2(2) was concerned with the analysis of competing public interests, that is the public interest in not disclosing the information as against the public interest in disclosure. Secondly, the premise of the current debate was that aggregating the different public interests reflected in the provisions of Part II as opposed to considering each provision separately and in isolation, could make a real difference to the analysis in some cases, as appeared from paragraph 25 of the judgment of the Upper Tribunal. Thirdly, if that were the case, there is no reason why Parliament would have intended that the combined weight of the public interest in not disclosing the information should be left out of account. There was no reason why the public interest in non-disclosure should not be fully weighed when considering whether that public interest outweighed the public interest in disclosure. Rather, Parliament must have intended a true balance of all the relevant public interests in non-disclosure to be weighed in the balance.

27. Fourthly, Sir James submitted that the proper approach to the interpretation of FOIA did not involve a presumption against less disclosure. Rather the scheme of FOIA requires a balancing of different public interests and required an accurate weighting,

and balancing, of those interests. The scheme had built into it a presumption in favour of the public interest in disclosure, in that the public interest in non-disclosure had to outweigh that public interest. But beyond that, FOIA did not create a presumption in relation to how the balancing exercise was to be carried out. Fifthly, the natural meaning of the language used in section 2(2) favoured aggregation. The section required that the balancing exercise be considered in "all the circumstances of the case". That must include the fact, or circumstance, that more than one provision in Part II arises in a particular case and, if combined, may give greater weight to the public interest in non-disclosure. Further, the word "exemption" in section 2(2)(b) was a reference to the exempt status of the information not a reference forward to a provision of Part II of FOIA. That also reflected the structure of section 2(2). The decision-maker had first to consider if there the information benefitted from an absolute exemption from disclosure under section 2(2)(a) of FOIA. Then, if not, all that was left went into the balance under section 2(2)(b).

28. Sixthly, Sir James submitted that even if the respondents were correct and "exemption" in section 2(2)(b) meant "provision", the singular would include the plural by reason of section 6(c) of the 1978 Act. There was no contrary intention to be derived from FOIA. The section would therefore apply to "exemption" or "exemptions". Finally, the regimes governing disclosure under FOIA and the 2004 Regulations should be interpreted in the same way, not least because section 2(2) of FOIA and regulation 12 of the 2014 Regulations was materially similar and the disclosure of information might need to be considered under both. Parliament would not have intended different tests to apply and the two regimes should be read consistently. It was clear from the decision of the Court of Justice of the European Union ("the CJEU") in Case C-711/10 *Office of Communications v Information Commissioner*[2011] PTSR 1676 that aggregation of the public interest in non-disclosure was permitted.

29. Mr Lockley, for the Commissioner, submitted that "exemption" in section 2(2) meant a provision of Part II. The role of the decision-maker was to consider the public interest reflected in each statutory provision (either a section, or a sub-section of one of the sections in Part II of FOIA) and determine whether the public interest in maintaining the exemption contained in that particular statutory provision outweighed the public interest in disclosure. Aggregating the public interest in different provisions was not permitted. First, aggregating the different public interests reflected in different provisions would lead to less disclosure in some cases and that would not be consistent with the history and purpose of FOIA which was to promote openness. That appeared from the White Paper leading to FOIA, and the observations of Lord Hope in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, [2008] 1 WLR 1550, especially at paragraphs 4 to 7, and Lord Walker and Lord Mance in *BBC v Sugar* [2012] UKSC 4, [2012] 1 WLR 439, especially at paragraphs 76 to 77, and 110 respectively. The right to information was a constitutional right and the legislation should be interpreted in a liberal manner to promote that right, as recognised by Arden LJ in *Dransfield v Information Commissioner* [2015] EWCA 454, [2015] 1 WLR 5316, especially at paragraph 2.

30. Secondly, Mr Lockley submitted that the language did not permit of aggregation. Section 2(2)(b) used the word "exemption" in the singular (in contrast to the heading which referred to "exemptions" and to sections 63 and 64). That indicated that Parliament was focussing on an individual exemption, or provision. Further the

structure of section 2(2) supported that conclusion. The decision-maker considered first whether there was a provision which conferred absolute exemption, and if not, whether the public interest reflected in a provision outweighed the public interest in disclosure. If Parliament had intended the overall public interest to be weighed in the balance it would have said so. Rather, the language used indicated that the balancing exercise was meant to be gone through sequentially, provision by provision. Further, the reference to "all the circumstances of the case" meant all the circumstances relevant to each balancing exercise and did not require different public interests to be combined. Furthermore, Mr Lockley submitted that aggregation would be unworkable in many instances as the public interests reflected in the different provisions were very different and covered a wide range of matters. There would be many instances where it would simply not be possible to aggregate interests under different provisions. That was an indication that Parliament had not intended the different interests to be combined but rather intended them to be looked at separately. Section 6(c) of the 1978 Act did not assist as there was a contrary intention: Parliament did not intend more than one exemption to be considered together.

31. Mr Knight, for Mr Montague, adopted the submissions for the Commissioner and made the following additional submissions. Section 2(2)(b) required the decision-maker to consider each exemption individually, first to determine if there was an absolute exemption, and secondly, if not, to consider whether the public interest reflected in a particular exemption outweighed the public interest in disclosure. The approach advocated by the appellant would create a third stage, not provided for by section 2(2), which would involve the creation of a super-exemption where the combination of different public interests was considered to see if that justified non-disclosure. That was contrary to the structure of FOIA which created individual exemptions and which indicated that Parliament intended an individualised assessment of whether the public interest in the individual exemption outweighed the public interest. Parliament was not intending the decision-maker to consider some overarching principle of the public interest in non-disclosure. Further, the differential nature of the different exemptions also supported the view that Parliament intended them to be individually assessed not aggregated. Nor was there any guidance or indication in FOIA as to how a decision-maker should set about aggregating or combining different public interests, particularly where such interests were diverse, which was a further indication that Parliament did not intend that exercise to be carried out. Mr Knight submitted that section 6(c) of the 1978 Act did not apply as there was a clear contrary intention that each exemption be considered individually and section 2(2)(b) was not to be interpreted as meaning "exemption" or "exemptions". The contrary intention appeared from the purpose and structure of FOIA, and the specific use of exemptions in the plural where that was meant, whereas section 2(2)(b) used the word in the singular.

32. Finally, Mr Knight submitted that the 2004 Regulations were not a permissible aid to the interpretation of FOIA. They were made after FOIA had been enacted, under powers conferred by a different statute (section 2 of the European Communities Act 1972) and were intended to give effect to Article 4 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2023 on public access to environmental information and repealing Council Directive 90/313/EEC ("the Directive"). Article 4 of the Directive provided that "the public interest served by disclosure shall be weighed against the interest served by the refusal" to give disclosure. That had been interpreted as permitting aggregation by the *Office of Communications* case. The language of

regulation 12 had been interpreted as permitting aggregation in order to reflect the different wording in the Directive and was not a guide to the interpretation of section 2(2) of FOIA.

DISCUSSION AND CONCLUSION

33. The issue in this case depends upon the proper interpretation of section 2(2)(b) of FOIA and, in particular, the meaning of the phrase "the public interest in maintaining the exemption". That involves considering the words of the statutory provision, read in context and having regard to the purpose underlying the statute, and bearing in mind any legitimate aids to statutory interpretation. A word or a phrase must be read in the context of the section as a whole, and may need to be read in the context of a wider group of sections, as that may provide the relevant context for ascertaining, objectively, what meaning the legislature was seeking to convey in using those words. See generally, *R (O) v Secretary of State for the Home Department, R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, per Lord Hodge (with whom the other members of the Court agreed) at paragraphs 29 to 31. See also the judgment of Lord Sales (with whom Lord Reed, Lord Leggatt and Lord Stephens agreed) in *R (PACCAR Inc and others) v Competition Appeal Tribunal* [2023] UKSC 28, at paragraphs 40 to 44.

The Statutory Context

34. The statutory context is that FOIA conferred a right on a person who requests information from a public authority to be told by the public authority if it held the information and, if so, to be provided with a copy of the information. That right was, however, made subject to the provision of section 2 of FOIA: see section 1(2) of FOIA. Section 2 is concerned with the situations when certain information does not have to be disclosed. That depends upon whether the information is exempt information, and if so whether it has absolute exemption, or if not, by carrying out the balancing exercise provided for by section 2(2)(b) of FOIA. As Lord Hope expressed it in paragraph 4 of his judgment in *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 dealing with the Freedom of Information (Scotland) Act 2002, which is in similar terms to FOIA:

> "4. There is much force in Lord Marnoch's observation in the *Inner House* 2007 SC 231, para 32 that, as the whole purpose of the 2002 Act is the release of information, it should be construed in as liberal a manner as possible. But that proposition must not be applied too widely, without regard to the way the Act was designed to operate in conjunction with the [Data Protection Act 1998]. It is obvious that not all government can be completely open, and special consideration also had to be given to the release of personal information relating to individuals. So while the entitlement to information is expressed initially in the broadest terms that are imaginable, it is qualified in respects that are equally significant and to which appropriate weight must also be given. The scope and nature of the various exemptions plays a key role within the Act's complex analytical framework."

35. Similar observations were made in *Kennedy v Information Commissioner* [2014] UKSC 455, [2015] AC 455. Lord Mance (with whom Lord Neuberger and Lord Clarke agreed) said:

> "3. The FOIA provides a framework within which there are rights to be informed, on request, about the existence of, and to have communicated, information held by any public authority. But the framework is not all-embracing. First, these rights do not apply at all in cases which are described as "absolute exemptions" (see sections 2(1)(a) and 2(1)(b)) and are subject to a large number of other carefully developed qualifications. Second, as the other side of this coin, section 78 of the FOIA specifies that nothing in it "is to be taken to limit the powers of a public authority to disclose information held by it". "

36. Also in *Kennedy*, Lord Sumption (with whom Lord Neuberger and Lord Clarke agreed) said:

> "153. The Freedom of Information Act 2000 was a landmark enactment of great constitutional significance for the United Kingdom. It introduced a new regime governing the disclosure of information held by public authorities. It created a prima facie right to the disclosure of all such information, save in so far as that right was qualified by the terms of the Act or the information in question was exempt. The qualifications and exemptions embody a careful balance between the public interest considerations militating for and against disclosure. The Act contains an administrative framework for striking that balance in cases where it is not determined by the Act itself. The whole scheme operates under judicial supervision, through a system of statutory appeals."

The Wording of Section 2(2) of FOIA

37. I turn then to the wording of section 2(2) of FOIA. The key issue is the meaning of the phrase "the public interest in maintaining the exemption" in section 2(2)(b). That phrase, properly interpreted, means "the public interest in maintaining the exemption of the information from disclosure" and that public interest has to be weighed against the public interest in disclosure. The word "exemption" does not mean "provision of Part II". As the subsection is concerned with the public interest in maintaining the exemption of the information from disclosure, the natural inference is that it permits the decision-maker to weigh the combined, or aggregated, public interest reflected in the different applicable provisions of Part II. There is no reason why the public interest underlying each one of the provisions conferring non-absolute exemption should be considered separately in deciding whether the public interest in maintaining the exemption of the information from disclosure outweighs the public interest in disclosure. Rather, the natural inference is that Parliament would have expected all the relevant aspects of the public interest recognised in the applicable provisions of Part II to be considered when deciding whether the public interest in maintaining the exemption of the information from disclosure outweighed the public interest in disclosure. On a proper interpretation, therefore, section 2(2)(b) of FOIA permits the

public interest recognised in two or more different provisions in Part II to be assessed in combination or aggregated in determining whether the public interest in maintaining the exemption of the information from disclosure outweighs the public interest in disclosure.

38. That interpretation is consistent with the structure of FOIA and the wording of subsection 2(2)(b) taken as a whole. The subsection is dealing with the circumstances in which the right conferred by section 1(1)(b) to be provided with information does not apply. The opening words of subsection 2(2)(b) makes it clear that it is concerned with exempt information, that is "any information which is exempt information by virtue of any provision of Part II" of FOIA. The subsection then considers whether section 1(1)(b) applies to the information in question, that is whether the information must be communicated to the person making the request.

39. First, under section 2(2)(a) if "the information is exempt information" by virtue of a provision which confers absolute exemption, section 1(1)(b) does not apply to the information. The provisions conferring absolute exemption are the ones that are specifically listed in section 2(3) of FOIA. It is obvious that if the information falls within any one of the provisions conferring absolute exemption, the individual has no right to have the information communicated to him. It is not necessary to weigh the public interest in non-disclosure of the information against any public interest in disclosure. Nor is it necessary to aggregate the public interest in the different provisions conferring absolute exemption. The fact that the information is exempt by virtue of any one provision of Part II conferring absolute exemption means that section 1(1)(b) does not apply and the information does not have to be disclosed.

40. Secondly, section 2(2)(b) is concerned with information that is exempt information by virtue of any provision in Part II other than one conferring absolute exemption. The question then is whether "the public interest in maintaining the exemption" outweighs the public interest in disclosing the information. Section 2(2)(b) is still concerned with exempt information and the reference to "maintaining the exemption" is to be understood as referring to the public interest in "maintaining the exemption of the information" from disclosure. There is no reason for interpreting the word "exemption" in section 2(2)(b) as synonymous with "a provision of Part II". Indeed, "maintaining the exemption" does not readily lend itself to being read as meaning "maintaining the provision". Furthermore, Parliament uses the word "provision" on a number of occasions in section 2(2). If it had intended section 2(2)(b) to be concerned with "maintaining a provision conferring exemption", it would have said so.

The Specific Arguments of the Parties

41. I do not consider that the arguments put by the respondents lead to a different conclusion on the proper interpretation of section 2(2)(b) of FOIA. First, it is too simplistic to say, as the Upper Tribunal did and as the respondents do, that aggregation of the different public interests in non-disclosure would lead to less disclosure of information and so run counter to the purpose of FOIA which is to promote openness. Similarly, it is unduly simplistic to take the view that FOIA is to be interpreted in as liberal a manner as possible in order to promote the right to information. As Lord Hope recognised in the *Common Services Agency* case, the right to information is qualified in significant respects and appropriate weight must be given to those qualifications as the "scope and nature of the various exemptions plays a key role within the Act's

complex analytical framework" (see paragraph 34 above). A similar approach to FOIA has been recognised by Lord Walker in *BBC v Sugar (No.2)* [2012] UKSC 4, [2012] 1 WLR 439, especially at paragraphs 76 to 84 and in *Kennedy* by Lord Mance and Lord Sumption (with whom Lord Neuberger and Lord Clarke agreed) in the quotations set out at paragraphs 35 and 36 above. Rather, the wording of section 2(2) should be considered, in the light of the statutory context, to determine how Parliament intended the system of exempting information from disclosure to operate.

42. Secondly, there may well be cases where it is not feasible to aggregate the different public interests underlying the different provisions conferring exemption because the subject matter, or the particular aspect of the public interest reflected in certain provisions, is so distinct that they do not lend themselves to aggregation. That does not indicate, however, that the public interest underlying the different statutory provisions should not be aggregated when the different public interests do overlap or are otherwise capable of aggregation. Similarly, the fact that there is no specific guidance on how the process of aggregating different aspects of the public interest works is not an indication that Parliament did not intend the exercise to be carried out. Rather, the guidance is effectively given by section 2(2)(b) itself. The decision-maker must identify the public interest in maintaining the exemption of the information from disclosure and then consider whether that public interest outweighs the public interest in disclosure.

43. Finally, I do not consider that the interpretation that I consider correct is inconsistent with section 17 of FOIA. That section is concerned with a situation where a public authority refuses to comply with a request for information. Section 17(1) provides what a public authority must do if, amongst other things, it relies "on a claim that information is exempt information". The public authority must give the person making the request a notice which states that fact and "specifies the exemption in question" and states why the exemption applies. In that context, section 17(1) is clearly concerned with ensuring that the individual concerned knows the specific provision (or provisions) conferring exemption upon which the public authority is relying.

44. It is section 17(3)(b) which deals with how the public authority dealt with the request. If the public authority "is to any extent relying on a claim that … section 2(2)(b) applies" it must state the reasons for claiming that the "public interest in maintaining the exemption outweighs the public interest in disclosure". Those words mirror the wording in section 2(2)(b). The reference to the public interest in "maintaining the exemption" means the public interest in maintaining the exemption of the information from disclosure. It reflects the same exercise as contemplated by section 2(2)(b). It is a different exercise from that envisaged in section 17(1) which is concerned with ensuring that the individual knows which provisions the public authority relies upon. Specifically, section 17(3)(b) does not refer to maintaining "the exemption in question" as does section 17(1). That is a further indicator that section 17(3)(b), like section 2(2)(b), is not concerned with specific statutory provisions in isolation but rather the public interest underlying the exemption of the information.

45. Finally, for completeness, I note that I do not consider that two matters relied upon by Sir James assist in the resolution of the question of interpretation that arises in this case. First, I do not consider that the reference to "all the circumstances of the case" is a pointer to Parliament having intended all the different aspects of the public interest in non-disclosure to be weighed. Those words require account to be taken of all the circumstances relevant to the inquiry that is being undertaken. The words do not assist

in deciding the scope of that inquiry. If section 2(2) required the public interest reflected in each provision conferring exemption to be considered separately against the public interest in disclosure, the words require all the circumstances relevant to that inquiry to be considered. Similarly, if the words permit of the aggregation of different aspects of the public interest reflected in different provisions, the words require all the circumstances relevant to that inquiry to be considered. The words do not assist in determining what is the relevant inquiry, i.e. whether the inquiry is limited to considering the public interest underlying a specific statutory provision conferring exemption or permits consideration of the aggregated, or the separate, public interest reflected in the different provisions conferring exemption.

46. Further, I do not consider that consideration of the provisions of regulation 12 of the 2004 Regulations is a legitimate aid to the interpretation of section 2(2) of FOIA. The 2004 Regulations were made four years after FOIA was enacted, pursuant to different statutory powers. They were enacted to give effect to the Directive. The meaning of the different words in the Directive was authoritatively determined by the CJEU in *Ofcom*. The words of regulation 12 (even though similar to the wording of FOIA) had to be interpreted consistently with the meaning given to the Directive. The language of regulation 12 cannot therefore be used as an aid to the interpretation of section 2(2) of FOIA.

47. Finally, it is not necessary to consider the effect of section 6(c) of the 1978 Act. As indicated, section 2(2) of FOIA is concerned with maintaining the exemption of the information from disclosure. Those words permit the aggregation of the different aspects of the public interest reflected in the different provisions conferring exemption. There is no need to resort to the provisions of the 1978 Act. That would only be necessary if "exemption" in section 2(2)(b) meant "provision". Only then would it have been necessary to consider if exemption meant "exemption" or "exemptions" in accordance with section 6(c) of the 1978 Act. For completeness, in those circumstances, I would have read the singular "exemption" to include the plural "exemptions". Neither section 2(2) nor FOIA more generally evidences a contrary intention. The use of the plural "exemptions" in the heading to section 2 is not significant. That is a reference to the "exemptions in Part II": it is a recognition that there is more than one provision conferring exemption. Nor do sections 63 or 64 of FOIA indicate any contrary intent. The statutory context, and structure of FOIA, indicates that aggregation of the different aspects of the public interest reflected in the different statutory provisions is permitted.

CONCLUSION

48. I would allow the appeal. On a proper interpretation, section 2(2)(b) of FOIA permits the public interest recognised in two or more different provisions in Part II to be assessed in combination or aggregated in determining whether the public interest in maintaining the exemption of the information from disclosure outweighs the public interest in disclosure.

LADY JUSTICE ANDREWS:

49. I anticipate that it will rarely be the case that the issue of statutory construction that we have been asked to resolve would make a practical difference to the outcome of an application for disclosure under FOIA. I am not persuaded that it would have made a difference in the present case, since the Commissioner found that the information was

exempt under four heads, section 27(1)(a), section 27(1)(c), section 27(2), and section 35(1)(a), each of which he considered discretely (that being the approach which Mr Lockley, on behalf of the Commissioner, argued was the correct one). We do not know what the FTT would have decided if it had not considered sections 27 and section 35 cumulatively.

50. Yet it was the view of the Upper Tribunal that there may be cases in which aggregation, if permitted, could lead to less information being disclosed than if the approach advocated by the respondents were adopted, and the appeal proceeded on the basis that this premise was correct.

51. The submission that if information would not be exempt from disclosure on ground A alone, and if it would not be exempt on ground B alone, it cannot possibly have been Parliament's intention that it should become exempt by reason of a combination of grounds A and B, appears superficially attractive. However, once it is appreciated that the exercise to be conducted under section 2(2) involves weighing [all] the public interest considerations in maintaining the exemption of the information from disclosure against [all] the public interest considerations in disclosing it, as Lord Sumption JSC explained in *Kennedy* (see para 36 above) the argument becomes untenable.

52. Whilst the core purpose of FOIA is to encourage more open and accountable government by establishing a statutory right of access to information, there is no such right of access if the information is exempt. Therefore, the respondents' argument that there is a presumption in favour of disclosure is a circular argument. If the information falls within one of the specified categories of absolute exemption, no further justification is required for refusing the request. If it falls within one or more of the categories of so-called "qualified" exemption, then the resolution of the question of whether there is an entitlement to the information under section 1 of the Act will depend on the outcome of the balancing exercise under section 2(2)(b).

53. As section 2 recognises, information may be "exempt information" by virtue of *any* provision of Part II, and thus it may be "exempt information" by virtue of more than one such provision. There may be more than one reason that Parliament has recognised may justify, in the public interest, withholding the information from the person seeking access to it, and those reasons could well overlap. In cases where they do not, then no question of cumulative consideration would arise, but that does not drive one to the conclusion that the Commissioner should not be permitted to look at matters cumulatively in cases where it would be appropriate to do so.

54. Despite the assurance with which the proposition was advanced, I am unable to accept that the word "exemption" in subsection 2(2)(b) could possibly be interpreted as synonymous with "provision in Part II", given that in both subsection 2(1)(a) and subsection 2(2)(a) there is specific reference to a *provision* conferring an [absolute] *exemption*. That distinction is echoed in the opening words of section 2, which refer to information which is *exempt information* by virtue of any *provision* of Part II. Thus a statutory provision is the mechanism which confers a particular status on the information, which either protects it from disclosure absolutely (in the case of a specified number of categories) or, in the case of information falling within one or more of the remaining categories in Part II, it will only be protected from disclosure if it is demonstrated that the public interest in not disclosing it outweighs the public interest in disclosing it.

55. That interpretation is reinforced by considering section 2(1)(b) which again relates to information subject to "qualified" exemption. That section refers to consideration of whether the public interest in "maintaining the duty to confirm or deny" outweighs the public interest in disclosing whether the public authority holds the information. In principle I see no good reason why Parliament should have intended that the balancing exercise should be approached differently when the issue is whether the public authority should or should not reveal that it holds the information, from when the issue is whether the public authority should give the information to the person making the FOIA request (which will generally embrace both aspects). That points strongly towards the "public interest in maintaining the exemption" in section 2(2)(b) being understood as meaning "the public interest in not disclosing the information".

56. I am not persuaded that the structure of the statute points towards, let alone requires, sequential consideration of each separate exempting provision. That is not the natural reading of section 2(2)(b) or section 2 as a whole. On the contrary, if a set of information engages more than one provision to which that subsection applies, the "public interest in maintaining the exemption [from disclosure]" must logically encompass all the prejudicial consequences of the envisaged disclosure of the (provisionally) exempt information that arise in all the circumstances of the case. That interpretation is not only the natural reading of the language used by the drafter, but to me it makes complete sense. In principle, all the public interest considerations for and against disclosure should be weighed in the balance together.

57. Nor is it possible for the respondents to derive any assistance from the reference to "exemptions" in the headnote to section 2; this simply reflects the fact that there are different categories of exempt information in Part II.

58. For these reasons, as well as those given by my Lord, Lewis LJ in his judgment, with which I respectfully agree, I too would allow this appeal.

LORD JUSTICE BEAN

59. I agree with both judgments.