



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

**Appeal Reference: EA/2021/0043P**

**Before**

Judge Stephen Cragg Q.C.

and Tribunal Members

Ms. Alison Lowton  
Mr Dave Sivers

**Determined, by consent, on written evidence and submissions  
Considered on the papers on 12 August 2021.**

**Between**

**JOHN POWER OBO SOUTH CHINA POST**

**Appellant**

**and**

**(1) INFORMATION COMMISSIONER**

**(2) HM TREASURY**

**Respondents**

## DECISION AND REASONS

### DECISION

1. The appeal is dismissed.

### MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 82 and a closed bundle.

### BACKGROUND

4. The Appellant made a request for information to HM Treasury (HMT) on 21 January 2020 as follows: -

All emails, memos and briefings sent to or prepared for the Chancellor between January 3 and January 5 [2020] which discuss the Shanghai-London Stock Connect scheme'.

5. The time period mentioned appears to correspond to a period when there were reports about whether the scheme had been suspended.
6. On 6 February 2020 HMT confirmed that it held information falling within the scope of the request, but it considered this to be exempt from disclosure on the basis of section 27(1)(a) Freedom of Information Act 2000 (FOIA) (international relations). The Appellant asked HMT on 7 February 2020 for an internal review of this refusal. On 28 February 2020 HMT upheld the refusal on the basis of the application of section 27(1)(a) FOIA.

7. The Appellant contacted the Commissioner on 2 March 2020 to complain about HMT's decision to withhold the requested information. He argued that the public interest favoured disclosure of the withheld information and also questioned why HMT could not disclose a redacted version of the information.
8. During the course of the Commissioner's investigation the Commissioner says that HMT explained that it also considered the withheld information to be exempt from disclosure on the basis of the following exemptions within FOIA: sections 27(1)(c), 27(1)(d) (international relations), 43(2) (commercial interests) and 35(1)(a) (government policy). It also considered section 40(2) FOIA (personal data) to apply to the names of junior officials in the withheld information.
9. The Commissioner's decision notice is dated 19 January 2021 and only deals with HMT's arguments under s27(1)(a)(c) and (d) FOIA.

## THE LAW

10. Under section 1(1)(a) FOIA: -

1(1)(a) 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, ...

11. By section 2(3) FOIA, section 27 FOIA is defined as a qualified exemption by its exclusion from the list of absolute exemptions. Therefore, even if the exemption applies the information can only be withheld if 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information': s2(2)(b) FOIA.
12. Section 27 FOIA provides an exception to the duty to make disclosure of the information for international relations. It reads, materially, as follows: -

27 (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) ...
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.

...

13. In order for the prejudice-based exemption in section 27 FOIA to be engaged, three criteria must be met by the HMT.

14. First, the actual harm which HMT alleges would, or would be likely to, occur if the withheld information were disclosed has to relate to the applicable interests within the relevant exemption. Second, HMT must be able to demonstrate that some causal relationship exists between the potential disclosure and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice, which is alleged must be real, actual or of substance. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by HMT is met, namely that disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice.

15. In relation to the lower threshold (‘would be likely’) the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, this places a stronger evidential burden on HMT. The anticipated prejudice must be more likely than not to occur.

16. The first-tier tribunal (FTT) in *Gilby v IC and FCO* (22 October 2008) EA/2007/0071 stated that, in the context of s27 FOIA: -

23...prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage.

17. In *Campaign Against the Arms Trade v Information Commissioner and Ministry of Defence* (EA/2006/0040) at paragraph 82 the FTT noted that the mere risk of harm to international relations could in itself constitute prejudice: -

For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from [a foreign state] or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of [the foreign state] would not be predictable either as a matter of probability or certainty.

## THE DECISION NOTICE

18. The decision notice (IC-42689-N1K5) explains that: -

The London-Shanghai Stock Connect is an agreement to link the London Stock Exchange and the Shanghai Stock Exchange and as a result the financial markets in each jurisdiction. It provides a formal mechanism for Chinese and UK based firms to access each other's equity markets across two major financial centres.

19. In response to this appeal the Commissioner has also explained that further information concerning the launch of Stock Connect is available on the gov.uk website: <https://www.gov.uk/government/news/uk-china-efd-sees-launch-of-london-shanghai-stock-connect>. Relevant details on the operation of the Stock Connect Scheme can also be found on the website of the London Stock Exchange Group: <https://www.lseg.com/markets-products-and-services/our-markets/shanghai-london-stock-connect/listing-through-shanghai-london-stock-connect>.

20. The Commissioner explained HMT's position as follows: -

11. In its responses to the complainant HMT explained that if the requested information was disclosed this would be likely to prejudice the UK's relations with other states, the UK's interests abroad as well as the UK's ability to promote and protect these interests. HMT noted that the information in scope concerned Stock Connect, an UK interest abroad that forms part of the UK's broader financial and economic interests. HMT also argued that disclosure of the requested information would reveal details of private communications that have the potential to undermine the UK's international relations with implications for its interests abroad.

12. HMT's submissions to the Commissioner provided further detailed arguments to support its position that such prejudice would be likely to occur. However, HMT's further submissions refer directly to the content of the withheld information and in light of this the Commissioner cannot include these submissions in this decision notice.

21. The Commissioner went on to explain her approach to the application of s27 FOIA with reference to the principles set out above: -

15. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by HMT clearly relates to the interests which the exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect. With regard to the second criterion having considered the content of the withheld information and taking into account HMT's submissions, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice potentially occurring to the UK's relations with other international states. She also accepts that in turn this could harm the UK's ability to protect its interests abroad. Furthermore, she is satisfied that the resultant prejudice would be real and of substance. Moreover, the Commissioner is satisfied that there is a more than a hypothetical risk of prejudice occurring and therefore the third criterion is met.

16. Sections 27(1)(a), (c) and (d) are therefore engaged. In reaching this conclusion the Commissioner has considered whether there is scope for disclosing a redacted version of the information in the scope of the request. However, having carefully considered the content of the information the Commissioner accepts that the exemptions provide a basis to withhold all of the information in the scope and therefore it is not possible to disclose a redacted version of the information...

22. In relation to the public interest balance the Commissioner concluded that: -

22. In the Commissioner's view there is a clear public interest in understanding how the UK conducts its relations with other states. In the context of this case she agrees with the complainant that the Stock Connect scheme is one that is of interest not only to businesses in both countries but also to the wider public in the context of UK-Chinese relations. Furthermore, she agrees with HMT that disclosure of the withheld information could also provide an insight into how public authorities take particular decisions.

23. However, the Commissioner accepts that there is very strong public interest in ensuring that the UK's relationship with other states is not harmed in order to ensure the UK can protect and promote its interests abroad. The Commissioner has also carefully considered the detailed public interest arguments submitted to her by HMT and she considers these to be persuasive and compelling. In light of this the Commissioner has concluded that the

public interest favours maintaining the exemptions contained at section 27(1)(a), (c) and (d) of FOIA.

### THE APPEAL

23. The Appellant's appeal is dated 9 February 2021. The Appellant disputes the conclusion reached by the Commissioner in relation to the application of the public interest test: -

The Shanghai-London Stock Connect scheme is a matter of significant interest to businesses in China, the United Kingdom and around the world, and for the wider public in terms of its implications for relations for both countries. At a time of significant scrutiny of China's growing influence worldwide, and heated debate internationally about how to respond to this trend, the fate of the Shanghai-London Stock Connect is of significant public interest. The decision-making behind the suspension of the scheme would provide an important insight into questions surrounding the credibility of markets and financial regulation in China, and the challenge for liberal democracies of conducting international relations with fundamentally different states such as China. As the Information Commissioner's Office itself found, the public interest in these matters is clear and significant:

"In the Commissioner's view there is a clear public interest in understanding how the UK conducts its relations with other states. In the context of this case she agrees with the complainant that the Stock Connect scheme is one that is of interest not only to businesses in both countries but also to the wider public in the context of UK-Chinese relations. Furthermore, she agrees with HMT that disclosure of the withheld information could also provide an insight into how public authorities take particular decisions."

Given the clear public interest in this case, I contend that at least some of the information sought should and could be released — in redacted form where necessarily — without disregarding the government's legitimate interest in maintaining productive international relations and managing diplomatic sensitivities.

24. In her response the Commissioner expresses the view that these grounds of appeal argue that the exemptions in s27(1)(a), (c), and (d) are not engaged. However, it seems to the Tribunal that the Appellant's grounds of appeal focus wholly on the question of the public interest in disclosing or withholding the information, while accepting 'the government's legitimate interest in maintaining productive international relations and managing diplomatic sensitivities. In relation to the public interest arguments,

the Commissioner relies on the contents of the decision notice. She notes that the HMT submitted more detailed arguments which are also accepted by the Commissioner although the Commissioner is unable to refer to such arguments in an open response without risk of revealing the withheld information or information that is otherwise sensitive. If necessary, the Commissioner says she will make closed submissions concerning these arguments ‘at a later stage’, although none have been received.

25. HMT has been joined to this appeal as a Respondent. HMT makes the following additional points: -

Contrary to what is implied in the grounds of appeal, the Shanghai-London Stock Connect scheme is operational. It has not been suspended. As HM Treasury confirmed in its original response to the IC, the information falling within the scope of the request consists entirely of correspondence between officials and the Chancellor of the Exchequer’s private office and ministerial advice mentioned in that correspondence.

In the recent Integrated Review of Security, Defence, Development and Foreign Policy (‘Global Britain in a competitive age’, CP 403, March 2021) the Government confirmed its commitment to ‘enhanced China facing capabilities’ whilst acknowledging the ‘systemic challenge that [China] poses to our security, prosperity and values’. In addition, the Integrated Review acknowledged that ‘cooperation with China will also be vital in tackling transnational challenges’, while recognising that ‘China and the UK both benefit from bilateral trade and investment, but China also presents the biggest state-based threat to the UK’s economic security’. In other words, the bilateral relationship between the UK and China is complex but exceptionally important.

26. HMT expands on these points as follows: -

It is clear (see ¶25 of the Integrated Review) that China is demonstrating increased ‘international assertiveness’ and that China has a ‘growing impact on many aspects of our lives’ (¶37). This justifies the Government’s desire ‘to pursue a positive trade and investment relationship with China, while ensuring our national security and values are protected’ (¶37). This demonstrates a number of points of significance:



i. First, the threshold for each of the section 27 exemptions is low. As the FTT have previously held, ‘risk of an adverse reaction by another State is enough’. This threshold is likely to be met within the febrile atmosphere described in the Integrated Review.

ii. Second, there is an obvious risk of an adverse reaction (within the meaning of the Campaign Against the Arms Trade decision) from a State which is ‘increasingly assertive’ and which poses ‘systematic challenges’. The risk of such a reaction would be likely to prejudice the United Kingdom’s relationship with China (section 27(1)(a) FOIA).

iii. Third, the Government has made it clear that the United Kingdom’s interests abroad are directly associated with pursuing a ‘positive trade and investment relationship with China’. It cannot be disputed that releasing the information in issue in this appeal would pose a substantial risk of prejudice to the development of such a positive trade and investment relationship. This engages section 27(1)(c) and (d) FOIA.

This does not mean that the totality of HM Treasury’s concern is as to the UK’s relationship with China alone. The nature of the project discussed in the information falling within the scope of this request is international. There is a concomitant risk of the UK’s relationship with other states being prejudiced by disclosure.

27. As does the Tribunal, HMT considers that the Appellant’s appeal is directed at the application of the public interest balance and says: -

There can be no doubt (and HM Treasury does not dispute) that there is a legitimate public interest in furthering public understanding of the issues dealt with by public authorities, particularly in relation to significant projects such as the Stock Connect.

However, the public interest in preventing prejudice to the UK’s relationship with other States and interests abroad, especially in the context of the UK-China bilateral relationship, is hard to overstate. Given the significant risk of that relationship being impaired, together with UK interests being compromised, the public interest strongly militates against the disclosure being made. Ultimately, the Appellant seeks to place significant weight on his opinion that the public interest considerations justify the information

being released. But this does not grapple with the significant risk of prejudice to the United Kingdom's relationship with another State or the risk of prejudice to the United Kingdom's interests abroad. In these circumstances the IC was correct to conclude that the exemptions provided by section 27(1)(a), (c) and (d) FOIA were engaged and that the public interest favoured maintaining the exemptions.

28. HMT confirmed that it continues to rely upon the other exemptions cited to the Commissioner.

29. On 15 June 2021 the Appellant responded to HMT's arguments and said: -

HM Treasury argues the disclosure of information in relation to the Shanghai-Hong Kong Stock Connect would adversely impact relations between the United Kingdom and China, thereby harming UK interests. However, HM Treasury provides little evidence to support its assumption that either British-Chinese relations or UK interests would be harmed by the disclosure. HM Treasury merely states that disclosure would present a "significant risk of that relationship being impaired, together with UK interests being compromised." In terms of specific harm, HM Treasury points only to the "obvious risk of an adverse reaction" from China, without offering evidence to support this assertion apart from to note the country's "increasingly assertive" stance and London's view that China poses "systemic challenges." HM Treasury also asserts that its policy of pursuing a positive trade and investment relationship with China could be prejudiced by disclosure. Yet both of these objections rest on assumptions about China's likely reaction, when, in fact, it is not known how China would react to disclosure, nor, I would argue, can its reaction be reasonably predicted. China's position has not been sought and as such remains undefined and unclear. To act otherwise is to presuppose an outcome that cannot be known and is far from clear. Given the significant public interest in releasing this information, I would respectfully urge the Information Commissioner to favourably consider the appeal.

## DISCUSSION

30. As HMT states, the information falling within the scope of the request consists entirely of correspondence between officials and the Chancellor of the Exchequer's private office and ministerial advice mentioned in that correspondence. The Tribunal, as did the Commissioner, has had an opportunity to consider the information.

31. We agree with the FTT in *Gilby v IC and FCO* (22 October 2008) EA/2007/0071 when it stated that: -

23...prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage.

32. We also agree with the FTT in *Campaign Against the Arms Trade v Information Commissioner and Ministry of Defence* (EA/2006/0040) at paragraph 82 when it stated that the FTT noted that ‘there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from [a foreign state]... notwithstanding that the precise reaction of [the foreign state] would not be predictable either as a matter of probability or certainty’.

33. In relation to the prejudice, or likely prejudice claimed, we accept the submissions made by the HMT in its response to the appeal about the current state of relations between China and the UK. Although the Integrated Review referred to by the MHT (and extracted above) post-dates the request in this case, it seems to us that it can be taken as also reflecting the position in January 2020 when the request was made, and the importance of co-operating with China as well as recognising the ‘challenges’ posed by China. We accept that, as HMT says, the bilateral relationship between the UK and China is complex but exceptionally important.

34. The Appellant complains that HMT has made assumptions about China's likely reaction to disclosure when, in fact, it is not known how China would react. Although that is strictly correct, as set out in the case law above it is risk of adverse reaction, even if unpredictable, which is important and the contents of the Integrated Review cited by HMT appear to provide a good basis for the assessment of that risk, and in reaching the conclusions reached by HMT.

35. Having viewed the withheld material we also accept (as did the Commissioner) that the information in scope concerned Stock Connect, and UK interests abroad that forms part of the UK's broader financial and economic interests. We agree that disclosure of the requested information would reveal details of private

communications that have the potential to undermine the UK's international relations with implications for its interests abroad.

36. Thus, taking all the evidence into account, we accept that the potential prejudice described by HMT clearly relates to the interests which the exemption contained at section 27(1)(a), (c) and (d) FOIA is designed to protect. We are satisfied, as was the Commissioner, that there is a causal link between the information and harm occurring to the UK's relations with China. Our view is that the actual harm which HMT cites, namely prejudice to relations between the United Kingdom and China, the interests of the United Kingdom abroad, and the promotion or protection by the United Kingdom of its interests abroad would, or would be likely to, occur if the withheld information were disclosed,.
37. Having found that the exemptions in s27(1) FOIA apply the Tribunal must consider the public interest test contained in section 2 FOIA and whether the public interest in upholding the exemption outweighs the public interest in disclosing the information. In carrying out this consideration it is clear that weight must be given to the factors relied upon in establishing that the exemption applies, although it is equally clear that that cannot mean that effectively s27(1) FOIA provides an automatic exemption from disclosure.
38. The Appellant has good public interest arguments which support HMT disclosing the information, and that transparency in relation to the correspondence sought is important to enable the public understand the discussions taking place about the Stock Connect in the period of 3-5 January 2020 when there appeared to be some doubt as to the future of Stock Connect. In his appeal the Appellant cites and relies on the Commissioner's findings that the Stock Connect scheme is one that is of interest not only to businesses in both countries but also to the wider public in the context of UK-Chinese relations.
39. But we also note that HMT says that the Stock Connect was not suspended in January 2020 and continues in operation. General information about the Stock Connect is available on websites referred to above, and the Appellant has not identified any further public interest in this particular information beyond the general points covered by the Commissioner in her decision notice.

40. Having balanced these general public interests in disclosure against the public interest in preventing prejudice to the UK's relationship with other States and interests abroad (especially in the context of the UK-China bilateral relationship), together with UK interests being compromised, we agree with the Commissioner that the public interest strongly points towards the withholding the information, and we find that that is where the balance lies.
41. The Appellant has referred to the possibility of redacting the withheld material and disclosing some of it, but having considered the material in this context, it seems to us that that is impracticable and that the relevant correspondence needs to be considered as a whole. In any event, disclosure of fragments of the correspondence, even if possible, would not meet the public interest of increasing transparency in the decision-making process sought by the Appellant.
42. Our conclusion is that HMT is entitled to rely on section 27(1)(a), (c), and (d) FOIA to refuse to withhold the requested information.
43. We note that the Commissioner did not go on to consider HMT's reliance on other exemptions, and that HMT states that these exemptions are still relied upon. We also note the advice in as to how we should proceed in such circumstances from the UT in *IC v Malnick* [2018] UKUT 72 (ACC): -
- 109...If the FTT agrees with the Commissioner's conclusion regarding E1, it need not also consider whether E2 applies. However it would be open to the FTT to consider whether E2 applies, either by giving its decision on the appeal in the alternative (e.g. E1 applies but, if that is wrong, E2 applies in any event) or by way of observation in order to assist the parties in assessing the prospects of appeal or, in the event of an appeal to the Upper Tribunal, so that that Tribunal has the benefit of consideration of all exemptions which may be in play including relevant findings of fact. It is a matter for the FTT as to how it approaches such matters, taking into account all relevant considerations including the overriding objective.
44. Given our firm view that the exemption in s27(1) FOIA has been correctly applied, in our view we do not need to consider the other exemptions relied upon.
45. For all those reasons, this appeal is dismissed.

STEPHEN CRAGG QC

Judge of the First-tier Tribunal

Date: 13 August 2021.

