Neutral citation number: [2024] UKFTT 261 (GRC)

Case Reference: EA/2023/0422

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard in GRC Remote Hearing Rooms, Leicester

Heard on: 27 February 2024

Decision given on: 28 March 2024

Before

TRIBUNAL JUDGE A. MARKS CBE
TRIBUNAL MEMBER M. SCOTT
TRIBUNAL MEMBER S. SHAW

Between

THE DEPARTMENT OF HEALTH AND SOCIAL CARE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

JASON EVANS

Second Respondent

Representation:
The Appellant: Aaron Moss, Barrister
The First Respondent: Leo Davidson, Barrister
The Second Respondent: represented himself

Decision: The appeal is **dismissed** (save in part). The substituted Decision Notice appears in the confidential annex to this decision.

REASONS

Introduction

1. This is an appeal against the Information Commissioner's decision notice IC-238814-G7T9 dated 1 September 2023 ('DN').

2. The background to this case is the Infected Blood Inquiry announced by the then Prime Minister Theresa May in September 2017, and chaired by Sir Brian Langstaff. The Inquiry is investigating, and making recommendations for redress arising from, the supply in the 1970s and 1980s of blood clotting products from the USA to the NHS which were contaminated with HIV and Hepatitis C. These products were then supplied by the NHS to vulnerable individuals, mainly those with haemophilia, thousands of whom have since been infected and many of whom have died.

3. In January 2023, the Second Respondent ('Mr Evans') requested from The Department of Health and Social Care ('DHSC') copies of all emails sent to or from William Vineall (DHSC – Director of NHS Quality, Safety and Investigations) during the period 10-28 August 2022 that relate to Infected Blood Interim Compensation Payments recommended by the Inquiry. In March 2023, DHSC provided some information but refused to disclose the remainder citing sections 28, 31, 35, 36, 40(2) and 42 of the Freedom of Information Act 2000 ('FOIA').

4. The Commissioner decided that DHSC was entitled to rely on ss.35, 40(2) and 42 FOIA and in a confidential annex to the DN specified the information DHSC must disclose.

5. An oral hearing of DHSC's appeal took place via HMCTS's Cloud Video Platform on Tuesday 27 February 2024.

The internal review and response

6. On 3 March 2023, Mr Evans asked DHSC to carry out an internal review.

7. DSHC responded on 1 June 2023, acknowledging Mr Evans accepts the exemption in s.40 (Personal information) but otherwise maintaining its position.

Complaint to the Commissioner

8. On 15 June 2023**,** Mr Evans complained to the Commissioner about DHSC's handling of his request.

9. In his complaint, Mr Evans challenged DHSC's claim that the requested information is exempt under s.35, arguing that it relates to implementation rather than formulation of policy.

The Decision Notice

10. On 1 September 2023, the Commissioner issued his DN which in summary concluded, having seen the withheld information and received additional submissions from the parties, that:

> (a) some of the information withheld falls within the exemption in s.42 (Legal professional privilege) and that the balance of the public interest favours maintaining this exemption;

(b) other of the information falls within the exemption in s.35 (Formulation or development of government policy) but the balance of the public interest favours disclosure;

(c) the exemptions in s.28 (Relations within the United Kingdom); s.31 (Law Enforcement); and s.36 (Prejudice to effective conduct of public affairs) are not engaged; and

(d) to comply with the DN, DHSC must disclose the information specified in a confidential annex to the DN.

Appeal to the Tribunal

11. On 29 September 2023, DHSC sent a Notice of Appeal to the Tribunal challenging the DN.

12. The basis of the appeal is that the DN was wrong in law and that the Commissioner ought to have exercised his discretion differently in respect of each of the three exemptions relied upon.

13. DHSC's detailed Grounds of Appeal dated 26 October 2023 were, in summary:

(a) Ground 1 - As a matter of fact, in relation to s.35 (Formulation of government policy etc.), the Commissioner was wrong to conclude that the decision making being discussed in the withheld information exclusively relates to interim payments;

(b) Ground 2 - Further or alternatively in relation to s.35, the Commissioner drew an unsustainable distinction between discussions in relation to interim payments and those relating to the compensation scheme more generally. The two are intrinsically linked and any distinction is artificial;

(c) Ground 3 – Further or alternatively to Grounds 1 and 2, the information is exempt because it falls within the exemption in s.36 (Prejudice to effective conduct of public affairs) because in the reasonable opinion of a qualified person, its disclosure would (or would be likely to) prejudice the maintenance of ministerial collective responsibility, the free and frank provision of advice and the free and frank exchange of views;

(d) Ground 4 – the Commission was wrong to conclude that there is not a *'direct enough causal link between the disclosure and the claimed prejudice*' in respect of the exemption in s.28 (Relations within the United Kingdom).

14. DHSC asked the Tribunal to set aside the DN and substitute it with a decision notice which does not require disclosure of any of the information sought.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

Any person making a request 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 this is the case, to have that information communicated to him…

Section 2 FOIA: Effect of the exemptions in Part II

...(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a)…

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information…

…

Section 28 FOIA: Relations within the United Kingdom

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.

(2) In subsection (1) "administration in the United Kingdom" means –

(a) the government of the United Kingdom,

(b) the Scottish Administration,

(c) the Executive Committee of the Northern Ireland Assembly, or

(d) the Welsh Assembly Government.

Section 35 FOIA: Formulation of government policy, etc.

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

(a) *the formulation or development of government policy…,*

(b)…

Section 36 FOIA: Prejudice to effective conduct of public affairs

(1) This section applies to –

(a) information which is held by a government department…and is not exempt information by virtue of section 35, and…

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

(a) would, or would be likely to, prejudice —

(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or…

(ii) …

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

The role of the Tribunal

15. The powers of the Tribunal in determining appeals against the Commissioner's decisions for the purposes of FOIA are as follows:

> ***s.57 Appeal against notices…***
>
> *(a) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice…*
>
> ***s.58 Determination of appeals***
>
> *(1) If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
>
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

Evidence

16. Before the hearing, the parties had submitted written evidence. This comprised an Open Bundle of 144 pages (including an Index). The panel also had access to a Closed Bundle. Further materials in the public domain (such as Written Ministerial Statements, Press Releases and a response to a FOIA request of HMRC – as referred to below) were also considered.

17. William Vineall, Director of NHS Quality, Safety and Investigations, gave oral evidence on behalf of DHSC in an Open session of the hearing (summarised below), and also during a Closed session (summarised in the confidential annex to this decision). Mr Vineall also answered questions from the Commissioner, Mr Evans and the panel.

Submissions

Summary of written and oral submissions on behalf of the Commissioner

18. In summary, Mr Davidson on behalf of the Commissioner invites the Tribunal to dismiss the appeal for the following reasons:

> <u>Grounds 1 and 2: section 35</u>
>
> (a) While DHSC's reliance on s.35 is legitimate, there are two discrete policies, one relating to interim payments and the other to a comprehensive scheme of compensation. The fact there are similarities or resonances between two distinct policymaking processes does not mean that information which relates to the earlier one should be deemed to relate to the formulation or development of the later one. There are inherent

distinctions between the interim payments already made (which were of fixed amount, payable to all eligible affected parties in a uniform manner) and final compensation which will follow the final report of the Infected Blood Inquiry in May 2024, nearly two years after the interim payments were made.

(b) The government has been repeatedly emphatic in distinguishing between interim payments and final compensation – and has been consistent in its messaging to manage expectations such that the government has room to change what was done with the interim payments when it comes to final compensation.

(c) Focus on whether or not the policymaking in question was '*live'* is not the issue as the key question must be the content of the information and the likely effect of disclosure. In any event, it is for the Tribunal to decide whether policymaking is live or not: *DHSC v IC [2020] UKUT 229 (AAC) §§ 35-36.*

(d) Where the information relates to the formulation or development of policy relating to interim payments, by the time DHSC came to respond to the request, the policymaking process was long concluded.

(e) In reality there was little risk of prejudice to any '*live'* process of policy development or to the engagement of civil servants and others in free and frank exchanges: the information in general was either already known (and in the public domain through press releases, Ministerial statements etc.) because the interim payments had been made or was highly generic.

(f) Only where the emails expressly consider options in relation to the final compensation scheme or involve legal advice (and are therefore exempt from disclosure under s.42) does the public interest balance tip in favour of maintaining the exemption.

(g) The remainder of the information withheld under s.35 is largely matters of detail and either process and/or already completed by the date of the request.

(h) The public interest in maintaining the exemption falls short of the strong public interest in disclosure: the interim payments have been made, there is ongoing public controversy about the adequacy and speed of the government's handling of the crisis and the withheld information would contribute to that public debate by providing an insight into the way in which those issues were considered.

Ground 3: section 36

(i) As s.35 applies to the information, s.36 cannot.

(j) DHSC has provided a statement from Minister Maria Caulfield asserting that the information relates to **policy development** so by definition s.36 cannot apply.

(k) In any event, her *'reasonable opinion'* does little more than rehash the s.36 statutory text by reference to the need for a *'safe space'* but provides no causal link between disclosure and the supposed prejudice.

(l) Mr Vineall's statement relies on limb (2)(a)(i) of section 36 on *'collective responsibility*' though he acknowledges this formed no part of the Minister's statement.

Ground 4: section 28

(m) The Commissioner remains unsatisfied that DHSC has established any credible causal link between disclosure of the withheld information and likely prejudice to the relations between any administrations in the United Kingdom.

(n) While the withheld information may involve or relate or refer to devolved administrations, it does not follow that there is a real risk of substantial harm to relations between them.

(o) If there is any risk of harm, it is a low one – and the public interest commensurately light – whereas the public interest in disclosure is weighty for the reasons given in paragraph (h) above.

Public interest

(p) The focus in this case should be specifically on the withheld information and whether it should be taken to apply to ongoing policy development and, if so, the impact on it.

(q) One concern is the generic fear of the '*chilling effect'*, apparently in this case based on the concern that information being made public about interim payments would affect ongoing policy development. However:

(i) considerable information about interim payments is already in the public domain – see paragraph (e) above; and

(ii) the withheld information is largely issues of detail and process.

(r) There is an inherent distinction between interim payments and final payments. In this case, the interim payments were blanket, uniform payments to all affected in an amount reflecting the minimum compensation due. It was paid rapidly to avoid further delay and suffering pending final recommendations of the Inquiry. The public can be trusted to understand the difference between interim payments and final payments.

(s) The government has been emphatic in all its messaging and Parliamentary statements in distinguishing between interim and final payments. The government has therefore been carefully managing expectations about final payments and deliberately carving out room to change what **was** done with interim payments and what **will be done** with final payments.

(t) It is well-established in case-law that there is an expectation of robustness on the part of civil servants, especially for issues of such public importance as this involving an Inquiry at public expense tasked with addressing the questions of redress and compensation to victims of Infected Blood.

(u) The public is entitled to expect that those entrusted with decision making on such important matters as this will not be timorous or cowed by discussions in the media, Parliament and by the public themselves. The government can be expected to engage robustly without being overly distracted by external considerations.

Summary of written and oral submissions by Mr Evans on behalf of Factor 8

19. In summary, Mr Evans submits that the Decision Notice was correct, and the appeal should be dismissed because:

(a) In giving evidence to the Infected Blood Inquiry (the Inquiry) on 21 May 2021, the then Secretary of State for Health, Matt Hancock said if the DHSC made submissions about – or provided options for – the framework for compensation, sharing that with people either infected or affected by Infected Blood '*should be done completely in the open'*.

(b) Little weight should be given to the DHSC's arguments that disclosing the requested material *'could impede free and frank discussion'* given that both ministers and officials

would have had the expectation that the Inquiry could or would request and publicly release such emails or documents at some stage.

(c) Mr Vineall appears to argue that *'creation of public expectation'* is a factor against disclosure. This is flawed because:

(i) The government has accepted the case for compensation on many occasions going back to 2022;

(ii) Interim compensation payments have actually been made to infected victims still alive and bereaved partners: the very term '*interim'* implies that there will be further payments;

(iii) As for payments being made to parents and children as recently as 9 November 2023, Leader of the House of Commons and Cabinet Minister Penny Mordaunt said the government was '*committed to acting as swiftly as possible to ensure that all people, including those who should receive interim payments, do so.'* This statement was made in response to a question specifically about interim payments to parents and children.

(iv) Since the request was made, government officials have provided to the press estimated amounts of compensation. In the Financial Times on 9 May 2023, the figure quoted was *'between £5bn and £10bn'*. In the same paper on 5 December 2023, '*officials said they expected total payouts from the scheme to "exceed £10bn" but would probably be less than £20bn'.*

(v) As the public expectation of the amount of compensation to be paid has already been set - and the number of infected individuals and bereaved partners is known from the existing schemes, as is the number of ex gratia payments made through previous support schemes such as the Skipton Fund - it is futile to suggest that this information is not already in the public domain.

(vi) Public expectation has already been raised by the government accepting the recommendation for interim payments, leading to a reasonable presumption that the government intends to accept future recommendations relating to further payments.

(d) On oath to the Inquiry in July 2023, the Prime Minister accepted Recommendation 1 of the Sir Robert Francis study. That study used the term '*affected'* to include parents, children and siblings of those '*infected'*. While this occurred long after the request for information and a year after interim payments were made, it adds to already existing public expectations.

(e) The Commissioner was right to conclude that the policy around interim payments and the final compensation scheme are distinct. Mr Vineall implicitly accepts this by saying that *'Policy discussions about interim payments <u>are highly relevant to</u> the policy development of any future compensation scheme'* (emphasis added) i.e. they are not the same policy.

(f) As for DHSC's assertion that s.28 FOIA is engaged, an open joint letter from Scottish and Welsh Ministers to the Paymaster General about Infected Blood compensation and interim payments diminishes any argument that there is a likelihood of harm to relationships with the devolved authorities actually occurring.

(g) The government's historical and continuing lack of transparency on this issue has caused, and continues to cause, compounded suffering to many people.

(h) In addition to the public interest considerations raised by the Commissioner, the human impact of Infected Blood is both colossal and deeply personal for thousands of individuals and families. Many were ineligible for interim payments and have suffered because they do not know or understand the background to those payments.

(i) Overall, the public interest in disclosing the requested information is overwhelming: hundreds of Factor 8 members keenly await the outcome of this hearing.

Summary of oral evidence in Open session, and written and oral submissions, on behalf of DHSC

Evidence by Mr Vineall on behalf of DHSC

20. Mr Vineall accepts the strong public interest in transparency, particularly in the case of Infected Blood in understanding what went wrong, and how the compensation scheme will provide justice and redress to vulnerable people harmed whilst in the care of the state.

21. The Inquiry was instigated to get to the bottom of what went wrong and to ensure that it never happens again. There is therefore also strong public interest in the public knowing what the government will do when the Inquiry reports.

22. Much information is already in the public domain such as the Inquiry's Interim report in July 2022; the government's response in August 2022; the interim payments made in October 2022; a policy paper released in October 2022 with the government's thinking on these payments; and a statement on the tax treatment of those payments.

23. The policy on interim payments and the overall compensation scheme are intrinsically and inextricably linked because policy work is ongoing in respect of any further interim payments and final compensation.

24. Interim payments were made to infected people and affected partners (in all four nations of the UK) but how the government responds when the Inquiry's final report is published is yet to be established. The '*moral case'* for compensation is accepted: the government's response to the Inquiry's final report is pending its publication in late May this year.

25. The interim payments made in October 2022 were to those people registered with the various schemes – and they comprise the same cohort of people as today plus those newly registered with the schemes in the meantime but excluding those since deceased. In some circumstances, the estates of those deceased have received or will receive payments.

26. The link between development of the policy for interim payments made in October 2022 and other compensation is components such as the role of different Departments; the procedure for reaching decisions; how the funding is determined; the consequential tax treatment; and fraud considerations. All these issues had to be decided for interim payments and will all be relevant to the future compensation scheme too. The precise resolution of those issues is not in the public domain.

27. Were the processes, mechanisms and views which led to the decisions on interim payments to be disclosed, that would consolidate expectations which may be different from what the government has already said in public.

28. It is important that government can discuss confidentially and openly all component parts of the policy in a safe space so expectations are not created in relation to those component parts for future payments.

29. While the public knows that interim payments were made – how much and when – they do not know how or why. This is sensitive information, the disclosure of which would prejudice decision making in the future.

30. As for the s.28 exemption, the withheld material would prejudice relations between the UK administrations and should therefore not be available to the public. The impact of Infected Blood affects the whole UK and arose when there was one, not devolved, administration of health matters. Now the responsibility for schemes and payment of compensation is separate. The government made very clear in March 2021 that it wanted consistent schemes in the four nations, so discussions between the four nations is sensitive, nuanced and important to them all.

Gist of evidence heard in Closed Session

31. The gist of evidence heard in Closed Session was shared in a final Open Session in the following terms:

> (a) The Tribunal asked a preliminary question about whether certain information was in the public domain.
>
> (b) Mr Davidson continued his questioning of Mr Vineall by reference to the documents in the 'Closed' bundle (i.e. emails 1, 3, 4, 5, 6, 7, 8.1-4 and 9) and Mr Vineall's 'Closed' witness statement. In relation to the withheld information, Mr Davidson queried: how much it added to what was in the public domain; whether the matters discussed related to concluded or ongoing policy issues; how important the undisclosed matters were to the public or sectors of the public; what expectations the public would likely have (and on what basis) and the extent to which disclosure would in fact impact ongoing or future policy discussions.
>
> (c) Mr Vineall explained his concerns about the effect that disclosure would have on ongoing development of policy in relation to a final compensation scheme, particularly within a constrained timeframe (with the Inquiry's final report due to be published on 20 May 2024). He pointed to '*linkages*' between the interim payment scheme policy and outstanding policy issues relating to compensation more broadly. He suggested ways in which the disclosed information could give rise to expectations, and place undue pressure on the government. He expressed concern that he and his colleagues might be inhibited from free and frank discussions if they thought information about sensitive topics might be made public. He also set out his concerns regarding the effect of disclosure on the relationship between the UK government and the devolved administrations.
>
> (d) The Tribunal asked further questions about whether certain information was in the public domain and if so how that affected the analysis.

Submissions on behalf of DHSC

32. There does not appear to be any material dispute between the parties on the law.

33. DHSC does not pursue its reliance on s.31 FOIA (Law enforcement).

34. DHSC relies primarily on Grounds One and Two which concern s.35 FOIA (see paragraph 18 (a)-(h) above).

35. There is concern that ongoing public analysis of internal correspondence will result in civil servants being inhibited in future correspondence for fear of it being later disclosed. However, it is in the public interest for such discussions to be recorded in writing to ensure accuracy and a comprehensive archive. If, however, there is a risk of later disclosure there is also a risk that communications will not be committed to writing when they should be – and/or that civil servants will be more cautious about the ways in which they express themselves to colleagues.

36. The Commissioner is correct that s.35 and s.36 FOIA are mutually exclusive. However, as noted in Coppel at §31-005, the effect of this exclusion is slim in practice. In this case, as in many, *'the outcome of the balancing exercise may turn out to be no different whether s.35 or s.36 is applied.'*

Grounds One and Two

37. For Ground One, as Mr Vineall's evidence illustrates, the interim payments are so closely related to the compensation scheme more generally that policy matters relating to the former are still '*live'*. DHSC considers this a weighty factor to be taken into account. Mr Vineall has expressed concern that continuing policy development and collective responsibility will be adversely affected by disclosure of the requested information.

38. The basis for Ground Two is that there is no material distinction between the discussion of interim payments and the compensation scheme as a whole: they are intrinsically linked.

39. In reality, the question is what prejudice would result if the information were disclosed? This is a fact sensitive issue – not a binary question of whether or not the policy making is the same for interim payments and the compensation scheme as a whole.

Ground Three

40. The parties dispute whether the opinion of the qualified person on which DHSC relies is a '*valid opinion'.*

41. The Tribunal's task is to assess whether an opinion is substantively reasonable – not whether the qualified person gave the matter proper rational consideration in the formation of their opinion (though DHSC invites the Tribunal to conclude that in this case that there **is** evidence that the Minister did do so).

42. Mr Vineall's evidence supports the Minister's opinion being substantively reasonable.

Ground Four

43. Mr Vineall is an experienced and senior civil servant with particular expertise in the intricacies of cross-government decision making including relationships with the devolved administrations.

44. While the Tribunal must not follow the evidence of the government blindly and must subject it to appropriately anxious and independent scrutiny, the courts have recognised that they '*do not have personal experience of the diplomatic consequences of disclosure and that, as a result, the Tribunal must in such cases rely more on the evidence and less on its own experience in assisting the balance of the public interest*': Coppel on *Information Rights*, 6th Ed. §27-008 citing *FCO v the Commissioner and Plowden [2013] UKUT 275 (AAC).*

45. The Tribunal is invited to give due deference to Mr Vineall's assessment of the impact which disclosure would have on relations between the government and the devolved administrations.

46. His evidence is that *'it is essential that all four administrations are confident that they can communicate with one another directly and candidly and that confidentiality of their communications will be respected.'* He goes on to explain the effect of disclosure of the withheld material in this case.

Discussion

Possible unfairness of information being withheld from Mr Evans

47. The panel first went on to consider the possible unfairness of withholding certain information from Mr Evans.

48. Mr Evans has been provided with only some of the information falling within the scope of his request. The Tribunal permitted other information to be withheld from both Mr Evans and the public pursuant to GRC Rule 14.

49. For the purposes of the hearing, the panel was also provided with a Closed Bundle containing the withheld information and written evidence from Mr Vineall on behalf of DHSC. The panel also heard oral evidence from Mr Vineall in a Closed Session of the hearing.

50. The panel takes account of the Tribunal's Practice Note on Closed Material. This explains that, where disclosure of the disputed information would defeat the object of the exercise, the law permits the Tribunal to deviate from the normal rule about all material seen (and also heard, in this case) by the Tribunal being available to all parties. However, such deviation is permissible only so far as is necessary to ensure that the purpose of the proceedings is not defeated.

51. The panel accepts that there is inevitably *some* prejudice in material being withheld from a party requesting it, but considers that this prejudice is mitigated by:

(a) the Tribunal's expertise, and exercise of an investigatory rather than adversarial function;

(b) the Commissioner being an independent, expert regulator who does not take sides. On the contrary, the Commissioner's role is to point out the strengths and weaknesses of both parties' cases in assessing the correct application of the law and regulations;

(c) informing parties excluded from 'closed' information as much as possible with maximum possible candour in the written reasoned decision;

(d) in this case, the withheld information includes personal data, which Mr Evans says he does not seek, and other information about interim payments which Mr Evans **does** wish to be disclosed; and

(e) the provision of a 'gist' of the Closed Session material (see paragraph 31 above).

52. Having considered all these matters and having carefully read the withheld information, the panel is satisfied that withholding the requested information – and the evidence heard during Closed Session - was and remains necessary to ensure the purpose of the proceedings is not defeated. Moreover, the prejudice to Mr Evans' position – mitigated as described above – is justified in the interests of justice overall.

53. For the avoidance of doubt, the panel renews the Tribunal's direction that all withheld information (and evidence given during the Closed Session) remains confidential under GRC Rule 14 until 35 days after the promulgation of this decision or, if later, until the hearing of any appeal against this decision.

The facts

54. The panel went on to consider the relevant facts of this case. Based on all the evidence the panel has seen and heard, the panel has made the following findings of fact as emboldened below. Where a fact is disputed, the reasons for the panel's findings are set out in unemboldened text:

(a) **A small amount of information was provided in response to Mr Evans' request.**

(b) **As explained above, during these proceedings the remainder of the requested information was withheld under GRC Rule 14 and will remain so held as indicated in paragraph 53 above.**

(c) **At the date of Mr Evans' request (December 2022), the government had not only announced that interim payments would be paid as recommended by the Inquiry's interim report in July 2022, but by the end of October 2022 had actually made such payments.**

(d) **The Inquiry's final report has yet to be published (expected in late May 2024) and therefore the government has not yet had opportunity to respond to the Inquiry's final recommendations.**

(e) **Necessarily, therefore, the government's policy relating to the Inquiry's final recommendations has yet to be decided.**

(f) **Likewise, policy decisions on further compensation to those '*infected*' or '*affected*' by Infected Blood have yet to be made.**

(1) As the ICO guidance says, whether decisions comprise formulation of policy, or are really about implementation, is a matter of degree. However, key indicators of policymaking are (a) if they require ministerial approval; (b) there are a range of options with differing outcomes in the wider world, and the consequences of the decisions are wide-ranging.

(2) The panel considers it significant in this case that the government has repeatedly stated that it will await the Inquiry's final report before issuing its response and considering further interim payments or final compensation payments.

(3) The panel is therefore satisfied that a range of policy options were at the time of the request (and are still at the date of this decision) being assessed and debated; the materials sought involve relevant Ministers, signifying that they would require ministerial approval; and the consequences of the decisions would be wide-ranging rather than case specific.

(4) The panel therefore concludes that, at the time of the request and continuing at the date of this decision, matters of policy in relation to the Inquiry's **final report** and the government's response are still '*live'* rather than mere implementation of already fixed policy.

(5) On the other hand, the panel does not accept DHSC's evidence or submissions that policy decisions in relation to **interim** payments made in October 2022 are *'inextricably linked'* to policy decisions in relation to further interim payments

or final compensation. We agree with the Commissioner's submission: similarities or common factors between the policy making process for the October 2022 interim payments on the one hand and further interim or final payments on the other does **not** mean that information which relates to the earlier one should be deemed to relate to the formulation or development of the later one.

(6) The panel also notes that the interim payments made in October 2022 were:

a. of a uniform amount without regard to individual payees' circumstances;

b. made rapidly (within three months of the recommendation being made, and within two months of the recommendation being accepted by the government);

c. paid free of tax and disregarded for the purposes of other state benefits received by payees;

d. funded by HMT rather than from Departmental or devolved administrations' budgets; and

e. made to specific classes of payees.

In the panel's judgment, irrespective of expectations or assumptions made by some members of the public, these considerations may or may not apply in full or part to further interim or final compensation payments.

Error of law or wrongful exercise of discretion in balancing the public interest

Is there an error of law in the Commissioner's Decision Notice?

55. Having made the above findings of fact, the remaining issues for the panel in this case are (a) whether the Commissioner made any error of law in the DN and (b) whether the Commissioner wrongly exercised his discretion.

56. DHSC does not suggest there is any error of law, nor does Mr Evans.

57. The panel is satisfied that there is no issue of law in this case save for whether the exemptions in s.28 and/or s.36 FOIA are engaged.

Section 28 (Relations within the United Kingdom)

58. Having reviewed with '*appropriately anxious and independent scrutiny'* DHSC's 'closed' submissions, Mr Vineall's 'closed' evidence and giving due deference to DHSC's opinion on these matters, the panel does not consider that disclosure of the withheld information would – or would be likely to – prejudice the UK Government's relations with any of the devolved institutions.

59. The panel therefore considers that s.28 is not engaged in this case.

60. However, to preserve a meaningful right of appeal, the panel does not set out here DHSC's 'closed' submissions nor Mr Vineall's 'closed' evidence on this issue. However, Mr Vineall's 'closed' evidence and the panel's reasoning on this point is set out in the confidential annex to this decision.

Section 35 (Formulation of government policy etc.) and section 36 (Prejudice to effective conduct of public affairs)

61. All parties agree that s.35 and s.36 FOIA are mutually exclusive: s.36(1)(a) explicitly applies only to information held by a government department which is **not** exempt information by virtue of s.35.

62. In this case there is no dispute that s.35 is **engaged**. Thus s.36 would apply only if the withheld information is, however, not **exempt** under s.35 i.e. because the public interest test applied to the s.35 exemption weighs in favour of disclosure of the information rather than maintaining that exemption.

63. If that were the case, bearing in mind DHSC's submission at paragraph 36 above, it is difficult to see that how the public interest test if applied to the **s.36** exemption would weigh any differently.

64. The panel considers that s.36 is not engaged in this case.

65. In case the panel is wrong about this – such that s.36 **might** be engaged in relation to those parts of the information which we conclude is not exempt under s.35 – we went on to consider the Minister's opinion dated 26 October 2023.

66. We note that the Minister does not give any specific examples of **why** and **in what respects** disclosing the information in this particular case would, or would be likely to, prejudice the effective conduct of public affairs or would, or would be likely to, inhibit the free and frank provision of advice or exchange of views.

67. Because of this, we are doubtful that s.36 is engaged even if s.35 is not – but even if s.36 **is** engaged, we do not consider the Minister's opinion adds any great weight to the public interest balance discussed below.

Did the Commissioner wrongfully exercise his discretion in balancing the public interest?

68. All parties and the panel acknowledge that if the s.35 or s.36 exemption is engaged, the public interest test must then be applied (the absolute exemption conferred by s.36 for information held by the House of Commons or the House of Lords does not apply). Information can be withheld only if the public interest in maintaining the exemption outweighs the public interest in disclosure.

69. The panel recognises that, in general, there is often likely to be significant public interest in disclosure of policy information, as it is likely to promote government accountability, increase public understanding of the policy in question, and enable public debate and scrutiny of both the policy itself and how it was arrived at.

70. In a case such as this – involving Infected Blood and deaths since the 1980s of hundreds if not thousands of vulnerable citizens in the care of the state – the panel considers that the public interest in matters relating to Infected Blood is extremely high.

71. The panel recognises that the imminent publication of the Inquiry's final report and recommendations renders policy discussions about compensation payments, including interim payments, particularly sensitive. However, that does not in the panel's view fundamentally affect the engagement of the exemptions claimed by DHSC nor more than minimally affect the public balancing exercise in determining whether engaged exemptions should be maintained or whether the information should be disclosed.

72. The panel considers that much of the information requested is either in the public domain through press releases, Ministerial statements etc. or is already known because the interim payments have been made.

73. Further, the panel considers that senior civil servants of all administrations within the UK – including those involved in the exchanges of emails sought by the request - can be taken not only to be robust in their communications but also fully aware of the likelihood of email correspondence being disclosable in response to FOIA requests, litigation or to the Inquiry.

74. We therefore attach little weight to concerns that disclosure of the withheld information would or might cause harm to the maintenance of collective responsibility, the free and frank provision of advice or exchange of views or otherwise prejudice the effective conduct of public affairs.

75. The panel notes the ICO's guidance that the relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Each case must be considered on its facts.

76. In this case, having carefully considered both the content and sensitivity of the withheld information - and DHSC's evidence and submissions (both open and 'closed') on the effect of its release - in all the circumstances the panel considers that it was legitimate for the Commissioner to order disclosure of most of the withheld material notwithstanding that the requested information:

(a) includes policy considerations which may or may not apply to ongoing and future policy discussions about further interim or final compensation payments;

(b) raises issues about '*safe space'* and '*chilling effect'* and '*free and frank exchange of views'* which in the panel's view (see paragraphs 73 and 74 above) carry limited weight in all the circumstances of this case; and

(c) includes sensitive – but not, in the panel's view, exempt – information, for example about amounts and sources of funding.

77. The panel does not accept DHSC's arguments that public assumptions or expectations about policy for further or final compensation payments renders policy decision-making about interim payments already made as '*formulation or development of government policy'*. We accept the Commissioner's submissions that, in this case, the government has been actively managing expectations as to future payments. Further, we would expect that whatever its response to the Inquiry's final report and recommendations, the government will go to considerable lengths to explain how and why its response is similar to or different from its response to the interim report.

Summary of decision

78. While paying due deference to DHSC's arguments and Mr Vineall's evidence, the panel does not accept that the factors in favour of maintaining the exemption outweigh the exceptionally strong public interest in disclosing the information.

79. Overall, the panel agrees with the Commissioner's conclusion that, bearing in mind the nature of the information withheld, the public interest in disclosing the withheld information outweighs the public interest in maintaining the exemptions in s.35 or s.36.

80. For completeness, the panel confirms that it is not in dispute in this case that certain of the withheld information is:

(a) out of scope (being outside the time period of 10-28 August 2022 covered by the request or relating wholly to future payments):

(b) exempt under s.42 (Legal Professional Privilege); or

(c) exempt under s.40(2) (Third parties' personal information).

81. For the avoidance of doubt, withheld information falling within any of the categories in paragraph 80 above is not to be disclosed.

Conclusion

82. For the reasons set out above, the panel finds that the Commissioner's DN was neither wrong in law nor did he wrongly exercise his discretion save in respect of some very limited material which he ordered to be disclosed and which the panel concludes should not be disclosed. Accordingly, the appeal is dismissed save to that limited extent and a substituted decision notice is included in the confidential annex to this decision. The confidential annex will be provided to the DHSC and Commissioner only.

83. The substituted decision notice specifies the information which the panel has determined can be withheld and that which must be disclosed. Necessarily this involves the contents of the actual information being withheld, hence it remains confidential for 35 days from promulgation of this decision or, if later, until the outcome of any appeal of this decision.

84. In the meantime, and pending the outcome of any further appeal, as indicated above all 'closed' material shall remain confidential under GRC Rule 14.

Signed: Date: 27 March 2024

Alexandra Marks CBE
(sitting as a First-tier Tribunal Judge)

