



Press Summary

23 July 2025

Department for Business and Trade (Respondent) v The Information Commissioner (Appellant)

[2025] UKSC 27

On appeal from [2023] EWCA Civ 1378

Justices: Lord Lloyd-Jones, Lord Sales, Lord Burrows, Lord Richards and Sir Declan Morgan

Background to the Appeal

This appeal concerns the circumstances in which information held by a public body and requested under the Freedom of Information Act 2000 (“**FOIA**”), can be withheld by the public body relying on “exemptions” in Part II of FOIA. In this press summary, all references to “sections” are to sections of FOIA.

Section 1(1)(b) creates a right to have information held by a public body disclosed, unless it is covered by an exemption. Exemptions are either absolute or qualified. Information falling within any absolute exemption can be withheld from disclosure. Information falling within a qualified exemption (“**QE**”) can be withheld but only if, under section 2(2)(b), “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information”. The specific issue raised on this appeal is whether, where information falls within multiple QEs, section 2(2)(b) requires the public interest in maintaining each of those QEs to be aggregated (“**the cumulative approach**”), or whether it requires the public interest in maintaining each QE to be considered separately (“**the independent approach**”).

The background to the appeal is that, in November 2017, Mr Montague, a journalist, made a FOIA request to the Department for Business and Trade (“**the Department**”) for information about the trade working groups working on post-Brexit trade deals. The Department withheld some requested information. The Department relied on two QEs in FOIA, covering information: (i) likely to prejudice international relations (section 27); and (ii) relating to the formulation of government policy (section 35).

Mr Montague complained to the Information Commissioner (“**ICO**”). The ICO upheld the Department’s decision to withhold the information. Mr Montague appealed to the First-tier Tribunal, which itself raised the issue of whether the cumulative approach or independent

approach was correct. It adopted the cumulative approach and, as a result, dismissed the relevant part of Mr Montague's appeal. The ICO disagreed with the First-tier Tribunal's approval of the cumulative approach and so joined Mr Montague in appealing that decision. The Upper Tribunal allowed the relevant part of the appeal, finding that the independent approach was correct. The Court of Appeal then allowed the Department's appeal on this issue: the cumulative approach was correct. The ICO appeals that decision to the Supreme Court.

Judgment

The Supreme Court dismisses the ICO's appeal: the cumulative approach is correct. Lord Sales and Lord Burrows, with whom Lord Lloyd-Jones agrees, give the majority judgment. Lord Richards and Sir Declan Morgan give a joint dissenting judgment.

Reasons for the Judgment

Lord Sales and Lord Burrows reason that it is important to have in mind that section 2(2)(b) is ultimately concerned with a public interest test. The natural inference is that, unless the words of section 2(2)(b) contradict it, the cumulative approach ought to be taken as this provides the most complete and accurate picture of the public interest. The independent approach requires ignoring relevant public interest considerations against disclosure of the information even though they have been specified in FOIA as public interest reasons for non-disclosure of the information [35].

The words of section 2(2)(b) do not contradict that inference. In fact, there are six textual indications that the cumulative approach is to be preferred [37-43]. First, properly construed, exemption by virtue of "any provision of Part II" refers to "any one or more" provisions not "a" provision. In any event, the Interpretation Act 1978 generally indicates that the singular includes the plural. Secondly, "maintaining the exemption" naturally refers to the information's exempt status, not to one specific provision creating that status. Thirdly, "the public interest in maintaining the exemption" is naturally read as referring to the public interest across all relevant QEs. It is strained to read it as mandating the independent approach. Fourthly, it is "the public interest" for and against disclosure that must be balanced. It is common ground that all public interest in disclosure is relevant. The natural inference is that all public interest in non-disclosure (engaged by relevant QEs) also should be considered. Fifthly, there is no good reason to exclude relevant public interest factors in favour of non-disclosure, particularly where they have been recognised by Parliament as relevant. Sixthly, weight should be given to the words "in all the circumstances". Those circumstances include the engagement of multiple QEs.

Other relevant FOIA provisions can be interpreted as being consistent with the cumulative approach [36], [44-47]. In particular, it is natural to interpret the duty to disclose information (section 1(1)(b)) and the public interest test applicable to it (section 2(2)(b)) consistently with the separate duty on a public body to confirm whether information is held (section 1(1)(a)) and the public interest assessment applicable to that duty (section 2(1)(b)). The duties have the same scheme and substantially the same wording. Insofar as the wording differs, it does not provide significant support for the independent approach. The cumulative approach applies to the public interest tests for both duties. The same cumulative approach can be taken in respect of section 17. This requires a public body claiming exemption from either the section 1(1)(a) duty or section 1(1)(b) duty to provide a notice identifying "the exemption in question" and, where the public body is relying on a QE, the public interest in non-disclosure. Where multiple QEs are relied upon, there is no difficulty in saying that the notice should set out the relevant public interest according to the cumulative approach.

Lord Sales and Lord Burrows also reject the submission that the cumulative approach would be more practically difficult or complex to apply than the independent approach [49-51]. To the contrary, the independent approach requires an artificial and unrealistic separation between aspects of the public interest in non-disclosure. The cumulative approach simplifies the exercise.

As a footnote, Lord Sales and Lord Burrows observe that a similarly structured (and worded) disclosure regime to FOIA exists in the Environmental Information Regulations (“EIRs”). Both the UK Supreme Court and Court of Justice of the European Union have approved the cumulative approach to public interest in non-disclosure under the EIRs [53-58].

Lord Richards and Sir Declan Morgan would have allowed the ICO’s appeal. They note that FOIA contains no express provision requiring the cumulative approach and, until this case, it has never been relied upon since FOIA was enacted [61-63]. FOIA does not contain a single public interest test against disclosure, but a series of different QEs. The cumulative approach will only be relevant where the public interest test for each individual QE would result in non-disclosure. Absent external aids or an identified policy indicating the cumulative approach, there is no basis for a “natural inference” that it is what Parliament intended [75-82].

The terms of section 2(2)(b) and scheme of FOIA contain the answer: the cumulative approach is not permissible [83-97]. First, section 2(1), relating to the duty to confirm if information is held, refers repeatedly to “the provision” conferring an exemption, i.e. the single provision. The words “any provision” in section 2(2) should be read consistently with section 2(1). Second, the words “in all the circumstances” are at most neutral and do not justify the cumulative approach. Third, “maintaining” the exemption inevitably refers to the source of the exemption, i.e. the specific QE engaged. Fourth, section 17 requires a notice identifying “the exemption” relied upon. That is a single exemption, and the cumulative approach would undermine the purpose of section 17 of promoting transparency and accountability from public bodies. There is a real risk that the cumulative approach will permit decision makers to take a broad approach to the public interest test, rather than the careful weighing of public interest for individual QEs.

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)