



Case Reference: EA/2023/0124

Neutral Citation Number: [2023] UKFTT 01071 (GRC)

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

**Heard: remote hearing by CVP
Heard on: 6 September 2023
Decision given on: 22 December 2023**

Before

**JUDGE O'CONNOR - CHAMBER PRESIDENT
TRIBUNAL JUDGE FOSS
TRIBUNAL MEMBER YATES**

Between

MATTHEW DAVIS

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) FOREIGN, COMMONWEALTH AND DEVELOPMENT OFFICE**

Respondents

Representation:

The Appellant: appeared in person.

The First Respondent: did not appear.

The Second Respondent: did not appear.

Decision:

The appeal is ALLOWED. The Information Commissioner's decision, referenced as IC-192547-J2P4, is not in accordance with the law.

Substituted Decision Notice:

The Foreign, Commonwealth and Development Office must, by no later than 4.00 p.m. on 19 January 2024, send to the Appellant a list of the bottles of wine from the Government Wine Cellar which were provided for any function at No 10 Downing Street between 1 January 2020 and 23 December 2021 at which no overseas guest was in attendance, stating the date and nature of each function, and the number of bottles of wine provided, including the type of each (by which is meant the name, make and date of make of each wine).

REASONS

Introduction to the Appeal

1. On 23 December 2021 the Appellant submitted this request (“the Request”) to the Foreign, Commonwealth and Development Office (“FCDO”):

“Since 1.1.20 to the current date please provide me with a list of what bottles of wine from the Government’s Wine Cellar were provided for functions at No 10 Downing Street, stating on each occasion the date, a list of the bottles supplied including the numbers of each type of bottle and the state occasion which warranted the supply of these bottles.”

2. By its response dated 8 June 2022, FCDO refused disclosure, relying on s27(1) (a) and (b) of the Freedom of Information Act 2000 (“FOIA”). It maintained its position upon internal review on 2 September 2022. The Appellant complained to the Information Commissioner (“the Commissioner”). This is an appeal against the Commissioner’s Decision Notice (IC -192547-J2P4) wherein he concluded that the FCDO was entitled to rely on s27(1) FOIA in refusing disclosure.
3. The hearing of this appeal took place on 6 September 2023, via Cloud Video Platform. The Appellant appeared in person. Neither the Commissioner nor FCDO appeared at the hearing, each relying on their written Responses to the Appellant’s Notice of Appeal, and on the contents of the Decision Notice.

Background

4. The Appellant has made previous requests in 2011 and 2012 of government departments for the amount and types of wine supplied and consumed at official government functions, evidenced by material attached to his Notice of Appeal.

5. In June 2011, he requested information relating to the amount of wine from the Government Wine collection consumed at recent State visits by the Pope and the President of the United States. The then Head of Government Hospitality, Protocol Directorate, Foreign and Commonwealth Office confirmed to him the name and date of each wine used, and in relation to his request for the number of bottles used at each event, informed him that Government Hospitality would publish the full details of all wines used each financial year in its annual report to Parliament. The Appellant sought an internal review into the refusal to confirm the number of bottles used. Upon review in 2013, the Foreign and Commonwealth Office said that: by its initial refusal, it had intended to rely upon the numbers of bottles used being exempt from disclosure pursuant to s22 FOIA (information intended for future publication) but that no annual report for the financial year 2010/2011 had been prepared, and the information in relation to the United States State visit would not have been covered by such a report in any event. Accordingly, given that the information he requested was not available through an alternative publication, and that the Foreign and Commonwealth Office had neither expressly cited s22 FOIA nor demonstrated that it had applied the requisite public interest test in relation to s22 FOIA, it exceptionally agreed to, and did, disclose the number of bottles of wine consumed by reference to each type of wine.

6. In February 2012, he requested information from Government Hospitality in relation to three, identified official lunches at No 10 Downing Street in 2011; the identity of the hosts and guests and total number of attendees at each lunch; the number of bottles of wine consumed from the Government Wine Cellar; and a breakdown of how many of each different types of wine were consumed. Government Hospitality confirmed the number of attendees, the purpose of the function by reference to the identity of the main guest e.g., Official Lunch for the Crown Prince of the United Arab Emirates, and the number of bottles of wine consumed, but not the identities of the other guests nor the type of wine consumed. The Appellant sought an internal review of the decision to withhold the information described. Upon review, the Head of Government hospitality declined to confirm the identity of the attendees on the basis that their personal data was exempt from disclosure pursuant to s40(2) and (3) FOIA but did confirm the types of wine served at each function.

7. In response to the Request, on 8 June 2022, FCDO confirmed that it held the information requested but withheld it under s27(1)(a) and (b) of FOIA. It said,

“The Prime Minister and other ministers and senior officials occasionally offer business hospitality to both overseas and domestic guests. We do not routinely release the details of such hospitality as to do so might undermine the purpose of the hospitality itself, and thus the national interest. It may compromise the goal of such international engagement by providing a running commentary of which foreign representatives were met and which were not met; how much was spent on one country, as opposed to the other; and diminish the ability to engage in secure and confidential channels of communication.

There is clearly a legitimate public interest in the expenditure of public funds and the use of s.27 requires the consideration of the public interest involved in releasing such information. However, we have carefully considered the public interest in this matter and feel that there is a strong national interest in not releasing details of the numbers of bottles of wine used at each event, which may invite unwelcome comparisons between the levels or standards of hospitality offered at each event. Such comparisons are very likely to undermine the purpose of the original hospitality and would potentially damage our relations with the nations, governments and individuals concerned.”

8. On 27 June 2023, the Appellant sought an internal review of the FCDO’s decision. He said that *“to suggest that the level of hospitality offered to one group, if disclosed to another, would endanger international relations seems rather far-fetched.”* By the conclusion of its internal review on 2 September 2022, FCDO maintained its position. In so doing, it said, *“It would be quite feasible for the guests of honour and events to be identified from cross-referencing with news stories and press releases of the time and thus not “far-fetched” to believe that damaging comparisons might be drawn.”*
9. On 20 September 2022, the Appellant complained to the Commissioner. On 11 November 2022, the Commissioner sought further information from FCDO, including a full, unredacted copy of the information requested, and examples of information already in the public domain which, combined with the withheld information, could allow damaging comparisons to be drawn about the differing levels of hospitality provided at the events in question.
10. FCDO’s Director, Protocol responded to the Commissioner by letter dated 16 December 2022. She provided a list of the events as requested, and of wines used

and bottle numbers associated with each event. She sought to justify FCDO's refusal to disclose the information requested by reference to s27 FOIA (international relations), citing specifically s27(1)(a), (c) and (d), and additionally referring to the "*potential application*" of the exemptions afforded by the following: s28 FOIA (relations within the UK), s29 FOIA (economic interests), s36 FOIA (the effective conduct of public affairs) and s43 FOIA (commercial interests).

11. By his Decision Notice, the Commissioner decided that the withheld information was exempt from disclosure pursuant to s27(1)(a), (b) and (c) FOIA, finding these exemptions to be engaged, and that in all the circumstances, the public interest favoured maintaining the exemptions. The Commissioner reasoned that: disclosure of the withheld information would be likely to undermine the UK's international relations with other states if comparisons were drawn between the levels of hospitality offered to different parties, which in turn would be likely to undermine the UK's ability to protect and promote its interests; moreover, disclosure would risk having a chilling effect on future events which added to the risk of prejudice occurring to the UK's relations with international partners and its ability to protect its interests in such a context.
12. He further decided that the balance of the public interest favoured maintaining the exemption; although there is a public interest in the disclosure of information which relates to how public funds and resources are used, there is a significant public interest in ensuring that the UK's diplomatic relations are not undermined and a clear public interest in the UK being able to make the most use of opportunities available as a result of providing the relevant hospitality. He recognised that while the period covered by the request was one that covered the unprecedented impact of Covid 19, none of the occasions under the scope of the request were ones that had been subject to investigation.
13. Given his decision as to the application of s27(1) FOIA, he expressly did not consider FCDO's reliance on s36 of FOIA, or indeed, any of the other FOIA exemptions to which FCDO had referred.

Notice of Appeal and the Commissioner's and FCDO's Response

14. By his Notice of Appeal dated 6 March 2023, the Appellant states that he does not believe that the Commissioner has "*taken into consideration the true weight of the public interest in disclosing the requested information and whilst they have agreed that the*

exemptions do apply I remain unconvinced that the information is sufficient to reach that threshold."

15. Both the Commissioner and the FCDO submitted written Responses to the Appeal. The Commissioner's Response maintained that the Decision Notice was correct. He characterised the Appeal as resting in two parts: (1) that the Commissioner had erred in concluding that the exemptions under s27 (1) (a), (b) and (c) FOIA applied to the withheld information; and (2) that the Commissioner had erred in concluding that the public interest in maintaining the exemptions under s27 (1) (a), (b) and (c) FOIA outweighed the public interest in disclosure of the withheld information.

16. By its Response to the Appeal, FCDO offered no separate arguments from those of the Commissioner in relation to the application of s27 FOIA, and it did not submit any evidence in the Appeal, relying instead on arguments set out in the letter sent to the Commissioner by the Director, Protocol to the Commissioner dated 16 December 2022. The FCDO's Response focused instead on the application of s36 FOIA, "*if the Tribunal [were to] allow the appeal*".

17. FCDO's position in its letter of 16 December 2022 can be summarised as follows:
 - a. FCDO publishes online annual or bi-annual reports on the Government Hospitality Wine Cellar to provide a transparent and comprehensive overview of the usage, value, costs and stock levels of the cellar, and to broaden the understanding of how the cellar is used to support the work of Government Hospitality.

 - b. There is a risk that given the amount of information published in these reports, it can be mosaicked with other information to identify more precisely what hospitality is provided to which guests at which events; the cross-referencing of events with contemporary news stories and press releases could then enable comparisons to be drawn as to the level or quality of hospitality offered, which might be damaging to the UK's relations with its international partners and undermine the original purpose of the hospitality as envisaged.

- c. Releasing details of hospitality to guests may compromise the goal of the UK's international engagement by providing a running commentary of which foreign representatives were met and which were not met; how much was spent on one country, as opposed to the other; and diminish the ability to engage in secure and confidential channels of communication; it may invite unwelcome comparisons between the levels or standards of hospitality offered at each event; such comparisons are very likely to undermine the purposes of the original hospitality and would potentially damage our relations with the nations, governments and individuals concerned; any perception as to different standards of hospitality could affect not just the relationship which the hospitality had been intended to support or build but also the ability of the UK to promote and protect its interests abroad.
- d. Additionally, release would have a chilling effect on the willingness of guests to attend such events; refusal of invitations would inhibit or prejudice the purposes of the function, which will always be focused on one or more elements of government policy; the risk is particularly acute in relation to small gatherings where it may be possible to draw inferences about an identifiable individual's or individuals' consumption of alcohol; the risk extends beyond amounts of alcohol consumed to the mere fact that alcohol may have been served at a particular event e.g. a small lunch in honour of a VVIP from a Middle Eastern country.
- e. The chilling effect referred to was not just relevant to international relations but would apply to a range of essentially domestic events to which foreign or diplomatic representatives were not invited. It is also of relevance to Government engagement across domestic policy areas, including relations with the devolved administrations within the UK (s28 FOIA), the ability to promote and deliver economic policy objectives in the economic interests of the UK (s29 FOIA), the effective conduct of public affairs (s36 FOIA) and potentially the protection of the Government's commercial interests (s43 FOIA). FCDO explained that it had not articulated these broader arguments previously given that most of the events falling within scope of the Request related to overseas guests and international relations. Its focus was on s27 FOIA *"largely due to FCDO being the department that looks after the wine cellar."*
- f. FCDO had taken account of the legitimate public interest in the transparency of government spending and activities and the importance of hospitality as a

tool for the Government to convene a broad range of people in the furtherance of both overseas and domestic policy priorities. They concluded that in light of the potential prejudice to aspects of Government engagement with overseas (and domestic) guests, and the extensive information already published by the Government in respect of the Government Hospitality Wine Cellar, they did not believe that there was an additional value to the public from disclosing the information requested, nor that it would outweigh the potential harm that could be caused to the purposes of Government Hospitality through the disclosure of the information itself or it mosaicking with other information already in the public domain.

Applicable law

18. The relevant provisions of FOIA are as follows:

Section 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.*

...

Section 2

Effect of the exemptions in Part II

...

(3) *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.*

...

Section 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.*

Section 28

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 29

The economy

- (1) *Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-*
- (a) *the economic interests of the United Kingdom or any part of the United Kingdom, or*
 - (b) *the financial interests of any administration in the United Kingdom, as defined by section 28(2).*

...

Section 36

Prejudice to effective conduct of public affairs

...

- (1) *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-*

...

- (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.*

Section 43

Commercial interests

...

- (2) *Information is exempt information if its disclosure under this Act would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).*

...

Section 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.*

19. The import of section 58 is that the right of appeal to the First-tier Tribunal involves a full merits consideration of whether, on the facts and the law, the public authority's response to the FOIA Request is in accordance with Part 1 of FOIA (**Information Commissioner v Malnick and ACOBA** [2018] UKUT 72 (AAC); [2018] AACR 29, at paragraphs [45]-[46] and [90]. In accordance with the recent decision of the Upper Tribunal in **Montague v Information Commissioner and DIT** [2022] UKUT 104 (AAC), at [86], "*the public authority is not to be judged on the balance of competing interests on how matters stand other than at the time of the decision on the request which it has been obliged by Part 1 of FOIA to make.*"

The hearing

20. For the purposes of determining this appeal, we have considered all the material contained within the Hearing Bundle, which is constructed in two parts, one OPEN and one CLOSED. The OPEN part included a copy of FCDO's letter of 16

December 2022, redacted so as not to show the links to press releases issued by the Prime Minister's Office relating to two of the events falling within the period of the Request. The Appellant has only seen the contents of the OPEN part of the Hearing Bundle. The CLOSED part contained that same letter with the links unredacted, and a list of wines used, and bottle numbers associated with each event. The reason the press releases, although themselves self-evidently public information, were provided as CLOSED material is because, taken together with the contents of the letter, the articles referenced in the link would enable identification of those events at which alcohol was provided by the Government Hospitality Wine Cellar i.e. would partially disclose the withheld information.

21. The CLOSED attachment to the unredacted letter is summarised in our CLOSED decision.
22. We have also considered the written Responses of the Commissioner and FCDO to the Appeal, and the oral submissions made by the Appellant at the hearing on 6 September 2022.
23. By those oral submissions, the Appellant developed his position as follows: what he characterised as a mere "*feeling of unease*" and "*some ephemeral disquiet*" on the part FCDO, were disclosure of the withheld information to be made, was insufficient to demonstrate that any harm could be suffered as a result of disclosure, and that consequently s27(1) FOIA was not engaged; where there is little or no evidence of harm so as to engage s27(1) FOIA, the public interest in favour of maintaining the exemption is reduced, and is substantially outweighed by the public interest in knowing the availability of alcohol at functions at No 10 Downing Street, during the period of the Request.

Discussion

Section 27 FOIA

24. Section 27 FOIA is a prejudice-based exemption. The approach to be taken in prejudice cases was set out in the First Tier Tribunal decision of **Hogan v Information Commissioner** [2011] 1 Info LR 588, as approved by the Court of Appeal in **Department for Work and Pensions v Information Commissioner** [2017] 1 WLR 1:

- a. First: the applicable interests within the relevant exemption must be identified.
 - b. Second: the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is "*real, actual or of substance*".
 - c. Third: the likelihood of occurrence of prejudice must be considered. The degree of risk must be such that there is a "*real and significant*" risk of prejudice, or there "*may very well*" be such prejudice, even if this falls short of being more probable than not.
25. Section 27 FOIA is a qualified exemption, which means that it only applies if in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
26. It is appropriate to note at this point the parts of s27(1) FOIA to which the Commissioner has had regard. By its initial response of 8 June 2022 to the Request, FCDO said that it was withholding information under s27(1)(a) and (b) of FOIA, namely to address the risk of (a) prejudice to relations between the United Kingdom and any other State, and (b) prejudice to relations between the United Kingdom and any international organisation or international court. It maintained its reference to s27(1)(a) and (b) on internal review.
27. Subsequently, by its letter dated 16 December 2022 to the Commissioner, FCDO indicated reliance on s27(1)(a), (c) and (d) of FOIA i.e. it maintained reliance on s27(1)(a) (prejudice to relations between the United Kingdom and any other State); made no reference to reliance on s27(1)(b) (prejudice to relations between the United Kingdom and any international organisation or international court); and introduced reliance on s27(1)(c) (prejudice to the interests of the United Kingdom abroad), and s27(1)(d) (prejudice to the promotion or protection by the United Kingdom of its interests abroad).
28. However, by his Decision Notice dated 9 February 2023, the Commissioner recorded FCDO as relying on s27(1) (a), (b) and (c), and reached his decision on the basis of the application of those sub-sections i.e. he did not articulate his decision by reference to FCDO's reliance in its letter of 16 December 2022 on

s27(1)(d). By his Response to the Appeal, the Commissioner proceeded on the same basis.

The applicable interests within the s27 FOIA exemption

29. The applicable interests are: (a) relations between the United Kingdom and any other State; (c) the interests of the United Kingdom abroad; and (d) the promotion or protection by the United Kingdom of its interests abroad; and (d) the promotion or protection by the United Kingdom of its interests abroad.

30. It does not seem to us that relations between the United Kingdom and any international organisation or international court (s27(1)(b)) form a category of applicable interest in this case; FCDO did not elaborate its position by reference to that provision, and there is nothing in its letter to the Commissioner of 16 December 2022 which refers to such an interest.

A causal relationship between the disclosure and prejudice which is real, actual or of substance

31. By its letter of 16 December 2022, FCDO expressed concern that supply of the information requested, taken together with information already in the public domain, for example, press releases confirming specific functions and their date, would allow a motivated enquirer to identify the nature and timing of the event, the main guests and the amount of alcohol which was consumed.

32. In fact, the Request already includes a request for the date of the function and “*the state occasion which warranted*” the wine supplied. Arguably, therefore, to the extent any event in scope of the request was a state occasion, and FCDO were to confirm that, then no mosaicking to ascertain the nature and timing of, the event or the identity of at least some of the attendees would be necessary. If, however, any event in scope of the request were not a state occasion, then there may be no associated press release to enable the mosaicking exercise feared. We accept, however, that a press release is given only as an example of publicly available material which may enable mosaicking, and that there may be other publicly available material which might be exploited to similar effect.

33. FCDO has read the Request as relating to wine *consumed*. The Request itself sought the amount (and type) of wine *supplied* (although we note that by his Notice of Appeal the Appellant said that the appeal outcome he was seeking was “...to have the decision to withhold the requested information to be overturned so that details of the wines etc consumed will be released.”). Obviously, disclosure of the amount of wine *supplied* does not indicate consumption, but we do consider it likely that supply levels will be taken to indicate consumption levels.
34. We accept that identifying the type and amount of wine supplied at a function, might be taken to indicate the quality and generosity of hospitality offered to the attendees at that function, and invite comparisons of those matters across other functions. We think that is more likely to be the case where the description of type of wine is sufficient to indicate its likely cost. We consider it plausible that disclosure of such matters could be an effective cause of prejudice to relations between the United Kingdom and another State, and, consequently, the interests of the United Kingdom abroad or the promotion or protection of its interests abroad, if, as FCDO contends and the Commissioner accepts, it might elicit the reactions posited by FCDO, namely the taking of offence by those attendees who might feel they had enjoyed a lesser level hospitality than other attendees. We also consider that such prejudice would be a matter of substance as opposed to a trivial matter: causing offence in the context of the United Kingdom’s relations with another State or of the United Kingdom’s interests, or promotion or protection of its interests, abroad is, or is potentially, a significant matter. The fact that one might not be able to grade the level of offence in advance of it being taken, arguably makes its prospect more sensitive.
35. Moreover, we accept that after-the-event exploration by the public of the amount and type of wine supplied or consumed at such events might cause the chilling effect in relation to future gatherings described by the FCDO, particularly smaller gatherings which might render consumption of alcohol (actual or assumed) by individuals more conspicuous or gatherings where supply or consumption of alcohol may cause offence for cultural or religious reasons. If hospitality is to be an effective diplomatic tool encouraging trust and confidence between parties, both guests and hosts will have a reasonable expectation that there will be a degree of circumspection as to the level of detail which will be published about an event, including the identity of attendees, the subject matter of discussion, the supply and consumption of alcohol. We consider that is more likely to be the case in relation to smaller or more sensitive events. Were the possibility for, or

effectiveness of, such events to be reduced by a concern as to disclosure of the type and amount of wine supplied at such events, that would constitute a real prejudice

The likelihood of the occurrence of the prejudice

36. By its refusal of 8 June 2022 to disclose the withheld information, FCDO said that disclosure “*may compromise the goal of such international engagement...*” and “*may invite unwelcome comparisons...*”, such comparisons being “*very likely to undermine the purpose of the original hospitality and would potentially damage our relations with the nations, governments and individuals concerned.*”

37. By his Decision Notice, the Commissioner said that he considered there to be a “*more than hypothetical risk of such prejudice occurring*” and a “*genuine risk that disclosure of the information would be likely to undermine the UK’s international relations with other states if comparisons are drawn between levels of hospitality offered. In turn, the Commissioner considers that this would be likely to undermine the UK’s ability to protect and promote its interests. In reaching the conclusion that the level of likelihood had been met the Commissioner has been persuaded not simply by the FCDO’s argument about comparisons being drawn and the consequences that may follow, but also about the potential risk of offending those that have attended events listed in the withheld information. In particular, the Commissioner notes that disclosure of the level of detail requested would be against normal expected practice with regard to the hospitality offered by governments.*”. He appeared, therefore, to assess likelihood by reference to the qualitative nature of the risk and its consequences, were the risk to crystallise, as described by FCDO.

38. The question of the meaning of likelihood in the current context was addressed by the Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006): “We interpret the expression “likely to prejudice” as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.” In so doing, the Tribunal drew on the judgment of Munby J in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin) (a Data Protection Act case) who said: “Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.” [100].

39. We adopt the interpretation of “*likely to prejudice*” as meaning that the chance of the prejudice being suffered is more than a hypothetical or remote possibility; there is a real and significant risk.
40. FCDO presented no witness or expert evidence to the Tribunal on the question of likelihood of the occurrence of relevant prejudice. The only primary source material, such as it is, before us was FCDO’s letter of 16 December 2022, authored by FCDO’s Director, Protocol. By that letter, she offered no description of her role as Director, Protocol or her own experience in matters pertaining to hospitality arrangements and their part in the function of international relations. She offered no empirical or anecdotal evidence to justify FCDO’s conclusion that disclosure of the withheld information “could” (she put it no higher than that) have the adverse impacts she identified. She did note that FCDO is the department that “*looks after*” the wine cellar.
41. This Tribunal does not have experience of the diplomatic consequences which may flow from issues relating to the quality, or the perceived quality, of hospitality. Our assessment of the likelihood of prejudice arising from disclosure of the withheld information is, therefore, necessarily heavily reliant on the FCDO’s stated concerns. Ultimately, despite the paucity of evidence on this issue from FCDO, we acknowledge that persons in the executive branch of government who are tasked day-to-day with addressing infinite aspects of relations between the United Kingdom and any other State, and the United Kingdom’s interests abroad, and the promotion or protection of those interests abroad, will, generally, be best placed to assess what is likely to prejudice those matters and the likelihood of that prejudice arising. Accordingly, and having considered all the evidence before us, we accept the arguments put forward by the Director, Protocol, FCDO, as to the likelihood of such prejudice being suffered, assessed by reference to the qualitative nature of the risks identified.
42. We find that s27(1) (a), (c) and (d) FOIA are engaged in relation to information in scope of the Request but only in relation to a function attended by any overseas guest (by whom we mean any guest representing a foreign State or from an embassy, high commission or consulate of a country other than the United Kingdom), that being the type of event in relation to which we understand FCDO by its letter of 16 December 2022 to have articulated the risk of prejudice, when it referred to events to which “*foreign State or diplomatic representatives were invited.*”.

43. However, we are not satisfied on the evidence before us that disclosure of the withheld information in relation to such an event which was not attended by any overseas guest, as we have described such a person, is likely to give rise to any relevant prejudice. It follows that we do not find that s27(1) (a), (c) or (d) FOIA are engaged in relation to any function which was not attended by any overseas guest.
44. In relation to any information whose disclosure we have found does engage s27(1)(a), (c) or (d) FOIA, we must consider whether the public interest in maintaining those exemptions outweighs the public interest in disclosing that information.
45. There is, and FCDO and the Commissioner accept this, a public interest in the disclosure of information which relates to how public funds and resources are used. The Commissioner has identified that there is already pro-active disclosure of use of the Government Wine Cellar, noting FCDO's reference in its letter of 16 December 2022 to annual or bi-annual reports on the Government Hospitality Wine Cellar, whose publication offers *"a great deal of transparency to the public on the expenditure and use of wines from the cellar and offers a detailed explanation of how, on what and why such expenditure is made."*
46. FCDO provided a link to such a report, which is called "Government Hospitality wine cellar bi-annual report, 2018 to 2020", published on 15 July 2021. Although the report is described as "bi-annual", connoting publication twice a year, if, as the period of this report indicates, it is only published every two years, then it should correctly be described as biennial, and will offer less frequent insight into cellar use than bi-annual report. In any event, the report in question covers the period 1 April 2018 to 31 March 2020, thus spanning only the first three months of the period of the Request. While it does not provide a breakdown of Government Wine Cellar supply on an event-by-event basis and consequently does not address any of those matters which are the subject of the Request, we accept that it does provide substantial transparency as to the use of the Government Wine Cellar generally.
47. However, the real public interest which falls to be considered in this case rests in the sting of the Appellant's stated purpose the Request: by his Notice of Appeal, the Appellant said: *"I specifically requested dates that fell during the period where the majority of the Covid restrictions were in place. This was intentional to confirm that, despite those restrictions being in place, hospitality and events continued. Given the whole*

party gate scandal and the continuing revelations regarding Government activity during the pandemic the public interest in disclosure outweighs the argument for withholding the information.

48. There is a clear public interest in the disclosure of information which may indicate unlawful activity on the part of those in government office during Covid restrictions: see **Beloff v Pressdram Ltd** [1973] 1 All ER 241, where Ungood-Thomas J observed at (260) that public interest covers “*matters, carried out or contemplated, in breach of the country’s security, or in breach of law, including statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangers to the public; and doubtless other misdeed of similar gravity.*” That public interest will have been heightened at the time FCDO refused the Request (8 June 2022), which came shortly after publication on 25 May 2022 by the Cabinet Office of the “*Findings of the Second Permanent Secretary’s investigation into alleged gatherings on government premises during Covid restrictions*”.
49. It is not clear to us that disclosure of information relating to the supply or consumption of alcohol at events within scope of the Request would, per se, be indicative of the mischief which the Appellant says his Request is designed to illuminate, namely that despite restrictions being in place, hospitality and events continued. However, in his oral submissions, the Appellant developed his position, submitting that it is difficult to imagine a more weighty public interest in this context than the availability of alcohol; as he put it “*we have lost a Prime Minister to that scandal.*”; and the consumption of alcohol at No 10 Downing Street is now more in the public eye than a decade ago. He accepted that while offence might be taken by guests attending different events as to the relative quality or cost of food served, he did not consider that there was a public interest in disclosure relating to the service of food in the same way that there is in relation to the supply of alcohol.
50. In this context, the Commissioner has taken into account the FCDO’s confirmations that: Government Hospitality only deploy wines and spirits from its cellar to support its activity in the provision of official business hospitality and government ministers and Grade 1 Civil servants; any events or functions at No 10 Downing Street during the period in question fully complied with the laws and regulations concerning business hospitality in place at the time; there were fewer than ten events for the period January 2020 to December 2021 falling within the scope of the request and none of these fell within the scope of the review carried

out by the Second Permanent Secretary to the Cabinet Office regarding compliance with Covid restrictions.

51. We have not identified that any of the events listed took place during any of the periods of national lockdown.
52. We consider that the fact there has been a public inquiry into gatherings at No 10 Downing Street during the period of the Request, and that none of the events in scope of the Request has been subject of that inquiry, satisfies the public interest in disclosure of information which might indicate unlawful activity on the part of those in government office during Covid restrictions, and to such an extent that the public interest in disclosure of the information sought by the Request is substantially diminished.
53. We balance against those considerations what we consider to be a very significant public interest in maintaining exemptions from disclosure which would be likely to prejudice relations between the United Kingdom and any other State, the interests of the United Kingdom abroad or the promotion and protection by the United Kingdom of its interests abroad, all inherently important matters. We are prepared to accept that the risk of such prejudice is not a hypothetical risk but a real one and likely to occur. Having considered all the circumstances, we find that the public interest in maintaining the exemptions outweighs any public interest in disclosure of the information.
54. Accordingly, we find that FCDO was entitled to rely on sections 27(1)(a), (c) and (d) to withhold the information requested in relation to any event in scope of the Request which was attended by an overseas guest.

Section 36 FOIA

55. In anticipation of the possibility that the Tribunal may be minded to allow the appeal in relation to the application of s27(1) FOIA, FCDO's Response to the Appeal invited our consideration of s36 FOIA (prejudice to effective conduct of public affairs). In a context where we have found that s27(1) (a), (c) and (d) are only engaged in relation to information requested relating to an event attended by an overseas guest, it is therefore necessary for us consider the application of s36 FOIA to the information requested which relates to any events in scope of the Request which do not meet that specification.

56. In this regard, FCDO submits that the information is not disclosable because of the “chilling effect” whereby the publication, or risk of publication, of details of these events might inhibit attendance at events where hospitality is provided in furtherance of government policy objectives; that it is likely that the information disclosed could be mosaicked with publicly available information about events and attendees to identify more precisely what hospitality is provided to which guests at which events; the provision of hospitality as part of business and diplomatic engagement is an important tool for the Government to convene a broad range of people in the furtherance of both overseas and domestic policy priorities, in other words an important part of the effective conduct of public affairs which often necessarily must be conducted in private. FCDO submits that against those considerations, disclosure of the information requested would be likely to prejudice the effective conduct of public affairs, and should accordingly be exempt from disclosure pursuant to s36(2)(c) FOIA.

57. It further submits that were disclosure of the information to result in reduced attendance at a relevant event, the free and frank exchange of views for the purpose of deliberation would likely be inhibited, so that the information should be exempt from disclosure pursuant to s36(b)(ii) FOIA.

58. Again, we observe that we have no witness or expert evidence before us to address these matters and are reliant on the opinions and arguments contained in FCDO’s letter of 16 December 2022, as follows:

“We believe that the ‘chilling effect’ outlined above – whereby the publication, or risk of publication, of details of these events might inhibit attendance at events where hospitality is provided in furtherance of government policy objectives – would also be likely to prejudice the effective conduct of public affairs, not least in that it would reduce the reach and effectiveness of that hospitality. If guests were inhibited from attending events, this could also reduce the opportunity for a free and frank exchange of views which is essential to the effective formulation and delivery of government policy. We also note that perceptions and comparisons of the level or standard of hospitality provided to different domestic events or guests could potentially undermine the purpose of the hospitality in a similar way to events with an international guest list. This undermining of one of the tools available to government to conduct public affairs has the potential to prejudice the effective conduct of public affairs. ...”

59. In relation to information other than statistical information, the application of s36 FOIA rests on a requirement for “*the reasonable opinion of a qualified person*” (s36(2)). S36(5) FOIA provides as follows:

“In subsections (2) and (3) “qualified person” -

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,

...

(c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,

...”

60. As we have already observed, FCDO’s letter was authored by the Director, Protocol, FCDO, who confirmed that FCDO is the department which looks after the Government Wine Cellar, and who produced the information contained in the Closed material. S36(5) FOIA stipulates the Minister of the Crown of the department holding the relevant information as the qualified person. The Director, Protocol is not that person. In those circumstances, absent a reasonable (or any) opinion from the appropriate qualified person, we do not consider that s36 FOIA is engaged *ad limen*.

Section 28 FOIA (relations within the UK), section 29 FOIA (economic interests) and section 43 FOIA (commercial interests)

61. By its letter of 16 December 2022, FCDO made passing reference to other exemptions under FOIA as follows:

“This ‘chilling effect’ on the ability of Government to use hospitality to advance its policy goals is not just relevant to international relations under s27 of the Act. This would apply to a range of essentially domestic events to which foreign or diplomatic representatives were not invited. It is also of relevance to Government engagement across domestic policy areas too, including relations with the devolved administrations within the UK (section 28), the ability to promote and delivery [sic] economic policy objectives in the economic interests of the UK (section 29), the effective conduct of public affairs (section 36) and potentially the protection of the Government’s commercial interests (section 43). Whether or not those exemptions are engaged in a particular case will depend on the specific factual circumstances. However, given the potential ‘chilling effect’ that the publication of

any information relating to consumption at specific events could have on future attendance at unrelated events, we feel that it is important to draw attention to the potential application of these exemptions to other requests. We also note that the 'chilling effect' could impact not just events which are managed by Government Hospitality, but also other events managed by departmental teams across government.

We did not articulate these broader arguments earlier in the correspondence given that most of the events that fall within scope of this request do indeed relate to overseas guests and international relations. Our focus was on the international relations exemption, largely due to the FCDO being the department that looks after the wine cellar. However, our analysis of the broader impact across government from this 'chilling effect', and our consideration of the public interest, has highlighted the potential impact on the conduct of public affairs as a whole, including on events with a wholly domestic guest list, which includes at least two of the events within scope of Mr Davis' request."

62. It concluded its letter by saying that the information subject of the Request should be withheld *"for a range of inter-connected reasons, principally, the likely impact on international relations under section 27 and the conduct of public affairs under section 36."* We infer that by using the word *"principally"*, FCDO was intending to convey that, although its focus was on the application of s27 FOIA, in relation to events with a wholly domestic guest list, it was also relying on s28 FOIA (relations between any administration in the United Kingdom and any other such administration); and/or s29(1)(a) FOIA (the economic interests in the United Kingdom or any part of the United Kingdom); and/or s29(1)(b) FOIA (the financial interests of any administration in the United Kingdom); and/or s43(2) FOIA (the commercial interests of any person). However, in this appeal, it offered no argument or evidence in relation to the engagement of any of those provisions. Nevertheless, we consider it appropriate to address these matters.

63. As regards s28 FOIA: FCDO has not sought to explain, and on the evidence before us it is not evident whether, and if so, how, disclosure of the withheld information, in the context of domestic events within scope of the Request, would, or would be likely to, prejudice relations specifically between any of the Government of the United Kingdom and the devolved administrations. We do not find that exemption to be engaged.

64. As regards s29(1)(a) and (b) FOIA: FCDO has not sought to explain, and on the evidence before us it is not evident whether, and if so, how, disclosure of the withheld information, in the context of domestic events within scope of the Request, would, or would be likely, to prejudice any relevant economic or financial interest itself. We do not find that exemption to be engaged.
65. As regards s43(2) FOIA: FCDO has not sought to explain, and on the evidence before us it is not evident whether, and if so, how, disclosure of the withheld information, in the context of domestic events within scope of the Request, would, or would be likely, to prejudice any relevant commercial interest itself. We do not find that exemption to be engaged.
66. In relation to the Appellant's request for information relating to an event in scope of the Request at which no overseas guest was in attendance, we conclude that FCDO was not entitled to rely on ss27(1)(a), (c) or (d) FOIA to withhold such information, and we also find that ss27(1)(b), 28, 29, 36 and 43 FOIA are not engaged. Consequently, to this extent we find that FCDO's response to the Request is not accordance with Part 1 of FOIA. Accordingly, and to this extent, we find that the ICO's Decision Notice is not in accordance with the law and the Appellant's appeal is allowed.

Signed: *Judge Foss*

Dated: 23 November 2023