Appeal EA/2012/0251

Between	Bradford & Bingley Action Group	Appellant
	and	
	The Information Commissioner	First Respondent
	and	
	The Cabinet Office	Second Respondent

Bradford & Bingley Action Group (BBAG) contend that the Information Commissioner's (IC) decision to uphold the Cabinet Office's (CO) refusal to provide the information requested by it under the Freedom of Information Act 2000 (FOIA), on the grounds that it is exempt under the Act and the balance of public interest favours maintaining the exemptions under section 35, is misconceived. BBAG would suggest the public interest argument strongly favours the disclosure of the information requested on two grounds, the negative effect on the UK economy of a failure to secure the truth in this matter and the obfuscation that B&B share and bond holders have been subjected to in respect of the flawed decision to nationalize their company:

First, the majority of B&B shareholders were pre-demutualisation savers, many of whom supported the rights issue believing they were entitled to a duty of care from the Government and the tripartite regulatory authorities. Despite the refusals to provide any of the information requested under the FOIA all the evidence BBAG has obtained indicates a determination by Whitehall and Westminster to avoid explaining why B&B was nationalized. Since the legislative changes in the mid 1980s which transformed the financial market place, successive governments have failed to make meaningful improvements in standards of corporate governance. This has resulted in enormous destruction of value in which the dotcom bubble and the banking crisis are the most obvious examples. Appendix 1 an open letter printed in the Investors Chronicle April 2003 from David Blundell, chairman of the United Kingdom Shareholders Association at the time, to Patricia Hewitt the Secretary of State at the DTI amplifies this, needless to say the Minister failed to acknowledge the letter or act on it. Arguably, if measures had been taken at the time the banking crisis would have had fast less impact.

Second, BBAG agrees with section 47 of the IC's decision notice as below:

"There is compelling public interest covered in the primary request because it would provide a first hand illustration of a key event in the banking crisis of 2008"

It is four years, six months since the nationalization and despite thousands of requests from B&B share and bond holders, they still do not know why the Government and tripartite regulatory authorities acted as they did. It is fortuitous that Gordon Brown admitted to making the decision to nationalise B&B in his book "Beyond the Crash" which was the converse of the CO's response to a FOIA request at the time, otherwise BBAG's pursuit of the truth would be no further forward. B&B had a far stronger balance

sheet than Royal Bank of Scotland (RBOS) and Halifax Bank of Scotland (HBOS), despite this its savings book and branch network were sold thus destroying it as a viable business and with the Government having control of the winding down process, a matter of continuing and considerable concern to the former share holders and remaining bond holders. Why was B&B treated differently to these other banks?

The key points in BBAG's original grounds of appeal are specified below as they highlight the catalogue of failure by the Government and the tripartite regulatory authorities which in its view are crucial to the "public interest" argument:

a) BBAG believes the EU and the UK Government may have been guilty of gross misfeasance in adopting International Financial Reporting Standards (IFRS) including IAS 39 which has enabled the banks to indulge in what may be fairly described as false accounting. It has proved to be a catastrophically defective standard which may contravene the law. Appendix 2, B&B Update 14. It would appear that Sir Mervyn King the governor of the Bank of England (BoE) agrees with this as he is on record in November 2012, when arguing for a £35 billion capital raising by British banks, as follows:

"Bank accounts are dishonest because Britain's accounting rules are faulty. Reckless lending, inflated profits, irresponsible bonuses have all been possible, not just because of greedy bankers, but because of the rules themselves – and a failure of regulators and politicians to recognise the problems"

The banks used IFRS and IAS 39 from 2005 onwards and it would appear the Government was content to receive the corporation tax generated from these inflated profits rather than exercise a duty of care towards savers and investors. BBAG considers that flawed accounting standards was one of the main contributors to the banking crisis and B&B's downfall. How else is one able to explain the series of events prior to its nationalisation: the B&B auditors signed off the 2007 Report & Accounts as a going concern, a dividend was paid followed by a successful rights issue at 55p a share completed in early August 2008 less than eight weeks before the nationalisation decision. Extensive audit work by KPMG on the rights issue and the interim results announced on the 29 August 2008 supported a solvent, well capitalised bank with net assets of £1.00 a share and a tier one capital ratio of 9.1% which was far stronger than RBOS and HBOS.

b) In BBAG's view the independent valuer Peter Clokey was extremely helpful, made every effort to explain his role and was trustworthy, this in stark contrast with the behaviour of other parties in this matter. However BBAG believes the Compensation Order was flawed as the Government concealed the fact that B&B had been provided with funding by the BoE prior to the nationalization, it pretended that the valuation would be fair and independent when the terms effectively dictated that it would be nil if funding had been supplied. This effectively suppressed debate in the period between nationalization and the General Election in May 2010 and suggests the Government indulged in a cynical exercise in news management.

c) BBAG and the Association of British Insurers contested the Government's argument that the loans to B&B under the Special Liquidity Scheme (SLS) were not ordinary market assistance when more than 30 banks had use of that facility. It conflicts also with the Government's submission to the European Commissioner (EC) stating that the SLS was part of the normal workings of the BoE whilst imposing conditions on Peter Clokey which stipulated the converse. Appendix 3, B&B Update 5.

d) Statements by senior members of the B&B board, both pre and post nationalization, together with reassurances from officers of the Financial Services Authority (FSA) when answering direct enquiries from the public on the financial viability of the company just days before the nationalization conflict directly with the Government's justification of its decision. The B&B share and bond holders still do not know who is telling the truth and many, including a retired senior police officer, believe that "criminal deception" is a strong possibility in this matter.

e) The IC's decision notice, sections 67-72, is critical of the CO for failing to respond to BBAG's FOIA request in a timely fashion and not providing assistance by advising of other public authority sources which may hold the information requested, it also instructed the CO to expedite the latter. It was only after a further complaint by BBAG to the IC that it was advised by the CO of an email sent to a redundant address despite it being in possession of BBAG's current email address, was this incompetence or a further example of the delaying tactics employed by the CO? BBAG has acted on this information now but is unlikely to have responses to its FOIA requests before the 16-17th April.

f) The original request under the FOIA was on the 9 March 2011 and the CO's refusal after interventions by the IC was dated 10 October 2011. BBAG requested an internal review on the 14 November 2011 and after a further intervention by the IC the CO provided the outcome of its internal review upholding its original position on the 31 January 2012, a period of forty months since the nationalization. BBAG agrees with much of the IC's decision notice with the exceptions of:-

Section 48. The ICO agrees with the CO that the policy matters referred to in the information remain live and the financial services sector remains a key contributor to the UK economy. As such there is a very strong public interest in protecting the safe space within which members of the government and their officials can discuss how to tackle the ongoing difficulties that the UK economy is facing. Protecting a safe space for discussions can improve the quality of decision making at the heart of government.

Section 49. Considering the information which constitutes Ministerial communication, the IC accepts there is also compelling public interest in preserving the convention of collective responsibility. This would be undermined by disclosure. Preserving the convention of Collective Cabinet Responsibility allows the Government to be able to engage in free and frank debate in order to reach a collective position, and to present a united front after a decision has been made. This is particularly relevant where the policy matter under discussion is still live or very recently completed as is the case here.

Section 50. The IC concludes that the public interest favours maintaining both the exemptions by a narrow margin. It recognises the compelling arguments in favour of disclosure submitted by BBAG but has given particular weight to the CO's argument that the information contains policy matters that are still being formulated and/or developed. They are in effect still live. The IC is unable to set out the detail of this argument without revealing the withheld information. With respect to the information which constitutes Ministerial communications it has given particular weight to maintaining the convention of collective responsibility. It would also appear that the CO is making a "seamless web" argument that the IC has accepted.

g) Detailed below are past decisions of the Information Rights Tribunal which may be considered relevant to this appeal:
Dept for Education & Skills Appellant v Information Commissioner Respondent, additional party The Evening Standard. EA/2006/0006. Before David Farrer QC
This is one of the leading cases on section 35(1)(a) , para 75(iv) sets out what has subsequently become known as the "safe space" argument, which applies to a request made when policy formulation is still taking place. Para 75(v) suggests this phrase normally comes to an end when the Government's decision is finally announced and comments that the seamless web argument is not helpful. The arguments for disclosure are given in paras 86 to 88 with the Tribunal concluding that 'the public interest in maintaining the exemption does not therefore out weigh that favouring disclosure' and upholds the IC's decision.
The Home Office Appellant v Information Commissioner Respondent EA/2010/0011 Before DJ Farrer QC
The appellant gave notice of appeal on the 3rd January 2010. It submitted that the IC erred in its assessment of the balance of public interests relevant to sect 35(1)(a) exemption, the appellant also identified further documents consisting of eight letters from one minister to another and two submissions from civil servant to a minister and relied on the qualified exemption s35(1)(b) which the IC acknowledged was engaged. Before the hearing the appellant abandoned reliance on sect 35(1)(a). BBAG would draw particular attention to the description of the case in paras 1-12 and the findings from para 43 onwards including:-
Para 58. We regard the passage of over four years from the tabling of the s.12 amendment to the request, together with the wholesale change of administration as significant. We note that Sir Malcom Rifkind qualified his warning to Newsnight viewers of possible damage to cabinet government by reference to a risk that 'it will be immediately or shortly after revealed which Minister said what'.
Para 59. We concede that lapse of time is not the only factor; some ministerial exchanges could be inhibited by the thought that they would ever be revealed, whether by order of the Tribunal or best–selling diary of a former colleague. Each case must be viewed on its own facts.
Para 60. We conclude that the ministerial exchanges revealed in this correspondence relate to an issue of substantial sensitivity and public concern. They are constructive, civilised, mildly informative and of significant, though not overwhelming public interest. Section 12 was enacted some time ago; we do not consider the delay in its coming into

force has real importance. The government to which those ministers belonged is no longer in power and had by the date of the request been superseded by the administration led by Gordon Brown.
Para 61. We are in no doubt that the public interest in withholding this information is limited and is clearly outweighed by the interest in disclosing it.
The Cabinet Office, Information Commissioner & Dr Christopher Lamb. EA/2008/0024 &29. Before Chris Ryan.
The Tribunal's majority decision (2 of the 3 members) was that the minutes of the cabinet meetings discussing the decision to go to war in Iraq should be disclosed.
Para 82. The majority has reached that decision in the belief that in this case the strength of the public interest in understanding the deliberative process recorded in the minutes did not arise from their detailed content. The Tribunal considered the whole of the two documents and heard evidence and argument in closed session, which considered whether, for example, the minutes showed the presence (or absence) of dissent between Cabinet members or the adequacy or inadequacy of the scrutiny applies to either the decision reached or the legal and evidential basis for it. However the majority considers the value of disclosure lies in the opportunity it provides for the public to make up its own mind on the effectiveness of the decision making process in context.
Para 90. The minority view of the third member confirmed that the basis for disclosure was to reveal the limited level of discussion but saw little value in so doing. (This may be particularly relevant as there is little evidence to suggest the Cabinet were kept fully informed in respect of the B&B nationalisation)

h) BBAG disagrees with the IC's contention that the policy matter is still live or recently completed. The CO's internal review was completed forty months after the nationalization and the IC's decision notice ten months thereafter. Government policy since the banking crisis is widely known to the general public and consists of quantitive easing which is a new way of printing money, low interest rates to help control the levels of bad debt in the economy whilst paying lip service to inflation thus ensuring the future repayment of the national debt will be in devalued money. Furthermore, even if certain aspects of policy remain live they are extremely unlikely to relate to the future of B&B, which has been predetermined by the Government due to the nationalisation and the sale of the savings book and branch network, a self contained decision with a clearly marked end point in September 2008. This means it is impossible to denationalize B&B unlike the other banks involved in the 2008 banking crisis. There is also a strong line of demarcation that conflicts with the CO's seamless web and collective responsibility arguments; the Government at the time of the nationalization is no longer in power having been superseded by the Coalition in May 2010 and Gordon Brown the prime minister at the time resigned as leader of the opposition and no longer plays an active role in politics. BBAG has difficulty in understanding on what grounds the IC's finding in para 48 of the decision notice that the issues were still live and that policy formulation and the need for a 'safe space' was continuing. However, BBAG agrees with the IC that the financial services sector remains a key contributor to the UK economy but considers this is a very strong argument in favour of disclosure not concealment. Surely the truth together with the future reputation of the regulatory authorities and 'the City' should be the all important factors in this matter.

Summary.
The nationalization of B&B on the 29 September 2008 was a flawed decision made in haste in a telephone call between Gordon Brown from the ante room of the Oval Office, the White House, Washington DC and Alistair Darling in the UK. Shortly after the nationalization the CO denied having records of events prior to the B&B decision in response to a FOIA request from Mr Jonathan Bloch and this together with the subterfuge and obfuscation of Whitehall and Westminster supports BBAG's view that the decision was primarily political. Is it a coincidence that the Conservative Party conference was being held in the week of the nationalization or that RBOS and HBOS, who had far weaker balance sheets than B&B but are major employers in the geographical power base of the Scottish Labour Party, received 61 billion pounds of support from the Government just days later. In BBAG's view the decision to nationalize B&B was neither proportionate nor equitable and not consistent with the support given to other banks at the time. To repeat the words of our appeal:

"If a government confiscates the property of its citizens without reason, explanation or fair compensation, particularly when it may be seen as at fault in its duty of care to savers and investors by not adequately regulating the companies involved in the banking crisis, then all concepts of democracy and equity are laid aside and, we submit, the role of fair and honest government is devalued".

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