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FREEDOM OF INFORMATION AND THE PUBLIC INTEREST TEST: SUPREME COURT SANCTIONS AGGREGATION OF QUALIFIED EXEMPTIONS

THE Freedom of Information Act 2000 ("FOIA") promotes transparency by granting a right of access to recorded information held by public authorities, subject to specific exemptions set out in Part II. Qualified exemptions trigger a public interest test under section 2(2): disclosure may be withheld only if "the public interest in maintaining the exemption outweighs the public interest in disclosing the information". In *Department for Business and Trade v Information Commissioner* [2025] UKSC 27, [2025] 1 W.L.R. 3456, the Supreme Court considered whether, where multiple qualified exemptions apply to the same information, this test must be conducted separately for each exemption or may be assessed cumulatively.

A journalist, Brendan Montague, requested information from the Department for International Trade (now called the Department for Business and Trade) about trade working groups set up to consider post-Brexit arrangements. The Department disclosed some material but withheld the agendas and minutes of those working group meetings, relying on two qualified exemptions under FOIA, namely section 27 (disclosure would, or would be likely to, prejudice international relations) and section 35 (the information related to the formulation of government policy). The Information Commissioner and the First-tier Tribunal largely upheld the refusal, the latter accepting that public interest factors could be aggregated across exemptions. The Upper Tribunal disagreed, but the Court of Appeal reversed that decision, holding that aggregation was consistent with the statutory language. Given the broader implications, the Supreme Court granted permission to appeal.

Delivering the 3:2 majority judgment, Lord Sales and Lord Burrows, with whom Lord Lloyd-Jones agreed, dismissed the appeal and upheld the Department's refusal to disclose the requested information. The majority identified six textual features supporting a cumulative reading of section 2(2). First, the reference to information exempt "by virtue of any provision of Part II" is treated as deliberately inclusive, pointing to the possibility that more than one exemption may apply at the same time (at [38]). Second, the phrase "maintaining the exemption" is understood as referring to the continued exempt status of the information, rather than to the effect of any single exemption provision (at [39]). Third, the reference to "the public interest in maintaining the exemption" is read as embracing the public interest arising from all relevant exemptions, not as confined to one exemption viewed in isolation (at [40]). Fourth, the balancing structure between "the public interest" in non-disclosure and "the public interest" in disclosure naturally accommodates multiple contributory factors on each side (at [41]). Fifth, since Parliament has specifically recognised each qualified exemption as a relevant aspect of the public interest, the majority considered it inherent that all should be taken into account on the non-disclosure side (at [42]). Sixth, the opening words of section 2(2)(b) – "in all the circumstances of the case" – are treated as significant, since where multiple exemptions apply the distinct public interest considerations they embody form part of the circumstances that must be considered (at [43]).

Structurally, the majority relied on the close parallel between sections 2(2)(b) and 2(1)(b), which respectively relieve public authorities of the obligations to disclose and to confirm or deny the existence of information that is subject to a qualified exemption, both using materially the same language and requiring a public interest balance focused on the overall outcome rather than on individual provisions considered separately (at [44]–[46]). Section 17, which, among other things, requires public authorities to justify relevant adverse decisions, was treated as consistent with this approach, since it envisages reliance on multiple exemptions and requires reasons to be given "in all the circumstances of the case", which the majority understood as calling for consideration of their combined public interest effect (at [47]–[48]). The majority also drew support from *R. (on the Application of Office of Communications) v Information Commissioner* [2010] UKSC 3, [2010] Env. L.R. 20, where a cumulative approach had been applied under the similarly worded Environmental Information Regulations 2004, SI 2004/3391. While not determinative, this reinforced the view that aggregation is a workable method within the broader access-to-information framework (at [57]–[58]). The majority concluded that strict separation would require "mental gymnastics" (at [50]) and that the cumulative interpretation best reflects the FOIA's text and purpose.

Lord Richards and Sir Declan Morgan dissented. They emphasised that the FOIA contains no express power of aggregation and that no such power had ever been invoked in over 20 years of practice, surfacing only when the First-tier Tribunal raised it of its own motion – suggesting it was not within Parliament's contemplation (at [63]–[64]). No external interpretive aids such as White Papers or parliamentary debates supported the inference that Parliament intended aggregation (at [75]–[76]) and either permitting or excluding it would have been a plausible legislative choice (at [78]–[79]). Turning to the statutory language, the dissent stressed that section 2 repeatedly refers to "the provision" and "the exemption" in the singular, indicating an assessment tied to individual Part II provisions rather than a collective exercise (at [85]–[92]). The FOIA's structure of discrete exemption categories, rather than a single global public interest test, supported exemption-by-exemption assessment (at [79]). Additionally, the dissent relied on the section 17 requirement that refusal notices specify and justify each exemption, presupposing an individual assessment of each exemption and leaving no room for aggregation (at [93]–[96]). Allowing aggregation would undermine transparency by expanding discretion and obscuring the reasoning process (at [97]–[98]). Finally, comparative reliance on the Environmental Information Regulations 2004 was rejected as inapposite, given their different statutory and EU-law context (at [100]); and the Interpretation Act 1978 did not justify reading "exemption" in the plural without disrupting the scheme of FOIA (at [101]). The dissent considered that the Information Commissioner's concern that aggregation would create serious practical difficulties deserved respect given the Commissioner's expertise, while the Department's suggestion of selective aggregation was unprincipled and pointed against such an interpretation (at [102]).

The cumulative approach offers a practical advantage: where information engages multiple exemptions, decision-makers can present a unified assessment of why the interests in non-disclosure outweigh those favouring transparency, rather than artificially separating closely related considerations. However, this simplification carries risks. Public authorities may be tempted to cite multiple exemptions in refusal notices and assert their combined weight without rigorous analysis of whether each is independently engaged and properly justified. The majority acknowledged that each exemption must still be satisfied on its own terms, but whether this safeguard will prove effective remains to be seen.

The risk is heightened by the lack of any prior experience in conducting cumulative assessments. Authorities will develop aggregation methodologies without established norms, increasing the likelihood of inconsistency. The dissent's observation that aggregation was not invoked in over 20 years of the FOIA's operation (at [63]) takes on added significance in light of the Supreme Court's recent emphasis in *Wathen-Fayed v Secretary of State for Housing, Communities and Local Government* [2025] UKSC 32, [2025] W.L.R. 3693 that settled administrative practice may demonstrate that words are capable of bearing a particular meaning, but not that they should be so interpreted (at [66]). Moreover, as Bailey observes, when practice has been shaped by government guidance, its interpretive weight is questionable, since it may reflect administrative convenience rather than legislative intent (D. Bailey, "Settled Practice in Statutory Interpretation" [2022] C.L.J. 28, 48). This caution applies with particular force where, as here, government departments are the primary beneficiaries of the interpretation.

From an oversight perspective, aggregation makes it harder to scrutinise whether individual exemptions genuinely warranted non-disclosure (at [94]–[98]). Consider a case where exemptions A and B would each be insufficient to justify non-disclosure independently: under the exemption-by-exemption approach, the information would be disclosed, but under aggregation, their combined weight may suffice – even though neither individually meets the statutory threshold. None of the six textual features identified by Lord Sales carries decisive weight individually and the phrase "in all the circumstances of the case" is particularly ambiguous: it could equally mean "taking into account the full factual context within each exemption" rather than "aggregating across exemptions". The dissent's structural argument reinforces these concerns: if Parliament had intended a single, unified public interest test for non-disclosure, it could have enacted one – as Australia's Freedom of Information Act 1982 does at section 11A(5) (at [79]). Instead, Parliament chose discrete exemptions, each with its own threshold and rationale, suggesting that each should be independently sufficient to justify withholding rather than allowing weaker exemptions to be bundled together.

The majority's assurance that aggregation will matter only in rare, finely balanced cases does not diminish its constitutional significance. Once judicially sanctioned, the approach is likely to be invoked regularly, even if it is decisive in only a minority of cases, increasing the burden on oversight bodies and potentially deterring requesters (at [64]). The cases most affected will be precisely those involving constitutionally sensitive information – high-level policy formulation, international negotiations, politically contentious decisions – where the public interest in transparency is strongest. More fundamentally, even where aggregation does not alter outcomes, it alters the FOIA's structural logic, shifting the analytical framework from discrete, independently sufficient exemptions to one in which multiple insufficient grounds may combine to sustain refusal. Authorities may default to cumulative reasoning, potentially shifting administrative culture away from rigorous justification of individual exemptions towards the accumulation of weaker grounds.

The Supreme Court's adoption of a cumulative reading of section 2(2)(b) reflects a pragmatic approach, prioritising administrative workability and coherence. The majority's interpretation permits authorities to assess the public interest in non-disclosure holistically, avoiding artificial compartmentalisation. But the dissent's insistence on exemption-specific analysis has considerable force, particularly given the FOIA's structural design and its emphasis on transparency and accountability. Ultimately, the significance of the judgment will depend less on its endorsement of aggregation than on how rigorously public authorities, the Information Commissioner and tribunals insist that each exemption is independently engaged and clearly justified. Aggregation should clarify the public interest balance, not obscure it.

KAREN MC CULLAGH

Address for correspondence: UEA Law School, University of East Anglia, Norwich Research Park, Norwich, NR4 7TJ, UK. Email: k.mccullagh@uea.ac.uk