



JUDICIARY OF
ENGLAND AND WALES

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: <https://www.judiciary.uk/judgments>

PRESS SUMMARY

29 APRIL 2022

**THE QUEEN
on the application of
ALL THE CITIZENS**

-and-

SECRETARY OF STATE FOR DIGITAL, CULTURE, MEDIA AND SPORT AND OTHERS

AND

**THE QUEEN
on the application of
GOOD LAW PROJECT**

-and-

THE PRIME MINISTER AND OTHERS

[2022] EWHC 960 (ADMIN)

Divisional Court: Lord Justice Singh and Mr Justice Johnson

Background to the Claim

All the Citizens (“AtC”) and the Good Law Project (“GLP”) challenge the use of non-Government (“private”) communication systems (such as WhatsApp, Signal and private email) for Government business. Their case is that the use of such systems, and also the use of “auto-delete” functions, means that public records that should be

retained are instead deleted or are otherwise not available to be preserved for the public record. They say that this is unlawful because (a) it is incompatible with the Public Records Act 1958 (“the 1958 Act”) and the Freedom of Information Act 2000 (“FoIA”); and (b) it amounts to an unjustified breach of various policies in respect of the use of communication systems, and record keeping. They also challenge the content of various Government policies, because, they say, those policies authorise conduct that is unlawful (the use of instant messaging services, and auto-deletion).

The Government accepts that Ministers (including the Prime Minister) and officials have sometimes used private communication systems and have made use of auto-delete functions. It disputes that this breaches the 1958 Act or FoIA. It agrees there has sometimes been non-compliance with policy, but it disputes that its internal policies are enforceable by a court. It says that some of its policies will be re-written in the light of the court’s judgment in this case.

Judgment

The Divisional Court (which is part of the High Court, when more than one judge is sitting) has dismissed each of the two claims on, in each case, all grounds.

Reasons for the judgment

The 1958 Act: Section 3(1) of the 1958 Act imposes a duty “to make arrangements for the selection of [public] records which ought to be permanently preserved and for their safe-keeping” [42]. Section 5(3) provides a public right of access to those records that have been put in the Public Record Office [46]. If a public body decided to burn all of its records that would frustrate the purpose of the legislation and would be unlawful [61]. But the 1958 Act does not impose an obligation to create public records or to retain any particular public record until a decision is made as to whether it should be permanently preserved. The duty is “to make arrangements” in respect of those records that should be selected for permanent preservation. This involves a large measure of discretion. It does not impose a duty to retain a record until a decision is made as to whether to place it in the Public Record Office [53] – [60].

FoIA: Section 1 of FoIA creates (subject to exemptions) a general right of access to information held by public authorities [47]. Section 46 requires the Secretary of State to provide guidance as to the practice which it would be desirable to follow in connection with the management of record keeping [49]. FoIA (including any code of practice issued under section 46) does not create a duty to preserve any record prior to the point at which someone seeks to exercise the right of access [62] – [64].

Policies: Policies are useful to promote good administration, but they are different from law and do not create legal rights as such [98] – [99]. In some contexts, policies can be enforced but, to date, those cases have been concerned with interferences with individual rights [100]. Public law has not reached the stage at which all administrative policies have become enforceable as a matter of law. Some policies are inward facing and do not concern the exercise of public powers [102]. The policies in this case come within that category and are not enforceable as a matter of public law [109] – [128].

The claims: Each of the claims brought by AtC and GLP fails, because the policies on which they rely are not enforceable in a claim for judicial review [130] – [131], [138], [140], the policies are not contrary to any legal obligation on the Government [135] and because the legislation does not impose an obligation to create or retain records and does not prohibit automatic deletion [133], [139], [141]. A challenge to a 2013 policy of the Cabinet Office fails for the further reason that the claim is out of time [142], [153] – [157].

Permission to appeal: The Court granted the Claimants permission to appeal to the Court of Appeal in view of the importance of the issues.