



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

EA/2011/0255

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50397684
Dated: 26 September 2011**

Appellant: RAZVAN VEER

Respondent: THE INFORMATION COMMISSIONER

Second Respondent: THE CABINET OFFICE

Date of hearing: 9 May 2012

Date of Decision: 21 May 2012

Before

**Annabel Pilling (Judge)
Malcolm Clarke
and
Paul Taylor**

Subject matter:

FOIA – Qualified exemptions – Ministerial Communications s.35(1)(b)

Representation:

For the Appellant:	Razvan Veer
For the Respondent:	Mark Thorogood
For the Second Respondent:	Oliver Sanders

Decision

For the reasons given below, the Tribunal dismisses the appeal but amends the typographical error in the Decision Notice dated 26 September 2011 as follows:

Paragraph 14, final line: the word “disclosure” to be replaced with “maintaining the exemption”.

No further action is required.

Reasons for Decision

Introduction

1. This is an Appeal against a Decision Notice issued by the Information Commissioner (the ‘Commissioner’) dated 26 September 2011.
2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the ‘FOIA’) to the Cabinet Office for information regarding the imposition of employment restrictions on Romania and Bulgaria when they joined the European Union (the ‘EU’) on 1 January 2007. He specifically asked for consideration to be given to release edited parts of the information. The information was withheld on the basis of the exemption provided for in section 35(1)(b) of FOIA (information relating to Ministerial communications) as the public interest in maintaining the exemption outweighed the public interest in disclosure.

Relevant factual background

3. When 10 mainly Central and Eastern European States acceded to the EU in 2004, the UK decided not to impose substantive work restrictions, and instead introduced transitional measures limited to the introduction of a worker registration scheme in order to monitor both the number of workers coming into the UK from those countries and

the sectors in which they were employed. The number of workers coming to the UK from these new Member States greatly exceeded expectations and caused a level of public and media concern, and placed a strain on public services in some areas. Therefore, when the decision to allow Romania and Bulgaria to join the EU was taken subsequently, the UK Government decided to adopt a more gradual approach to labour market access and exercise its right (under paragraph 5 of Annexes VI and VII of the Accession Treaty of 2005) to impose transitional restrictions¹ on Romanian and Bulgarian workers' access to the UK's labour market until the end of 2011. On 23 November 2011, the Government announced that these restrictions would continue until the end of 2013 on the basis that it judged the extension of the restrictions to be a proportionate means of addressing serious labour market disturbance.

Request for information

4. On 4 May 2010 the Appellant made a request under FOIA to the Cabinet Office as follows:

"I made a Freedom of Information request to the UK Border Agency to have access to the official minutes of the decision to impose employment restrictions on Romania and Bulgaria in 2006. In the first instance I was informed they had the information but they cannot release it and following the internal review I was told the decision was wrong and they do not have the information.

I was advised that the Cabinet office may have this information and I should request it from you. Please could you inform me if you have this information regarding the imposition of employment restrictions on Romania and Bulgaria when they joined the European Union on 1.1.2007.

¹ These restrict Romanian and Bulgarian nationals to employment that is either skilled or is in sectors where there continues to be a shortage of labour.

If you have this information and you cannot release it as it is due to statutory exemptions, can you release edited content or any part of this information that does not involve the exemptions?"

5. The Cabinet Office responded on 2 June 2010. It had identified information it held that fell within the scope of the request as the written minutes of a Cabinet Committee on Asylum and Migration in 2006 in which the Committee discussed the impact on the UK's labour market of the accession of Romania and Bulgaria to the EU. It withheld the information under section 35(1)(b) of FOIA, explaining the factors taken into account in respect of the balance of the public interest in disclosing the information.
6. The Appellant requested an internal review. After some delay, the Cabinet Office responded on 14 June 2011. It upheld the original decision to withhold the information relying additionally on the exemptions in sections 27(1)(a), 27(1)(c), 27(1)(d) and 35(1)(a) of FOIA.
7. The Appellant complained to the Commissioner on 15 June 2011. He indicated that he believed the Cabinet Office should have considered disclosing the requested information in edited form, with the exempt content redacted, rather than withholding the information in its entirety.
8. The Commissioner commenced an investigation and a Decision Notice was issued on 26 September 2011.
9. In summary, the Commissioner focused on section 35(1)(b) of FOIA and concluded that the disputed information clearly fell within the scope of the exemption and, in relation to the balance of the public interest, that the public interest in favour of maintaining the exemption outweighed the public interest in disclosure.

The Appeal to the Tribunal

10. The Appellant now appeals against the Commissioner's decision. With the consent of all parties this appeal was decided on the papers without an oral hearing.
11. The Tribunal was provided in advance of the Hearing with an agreed bundle of material, and written submissions from the parties. We were also provided with a small Closed bundle consisting of the disputed information and unredacted versions of the two witness statements in this case. The bundle also included a letter from the Cabinet Office to the Commissioner as part of his investigation. It appears to us that the majority of this letter does not refer to the content of the disputed information and that an edited version of this letter should have been seen by the Appellant and placed in the open bundle. Although we can not refer to every document in this Decision, we have had regard to all the material before us.
12. The Appellant is not represented in these proceedings and has put forward four grounds of appeal which challenge the Commissioner's Decision Notice:

Ground 1: the Commissioner erred in concluding that the information was exempt from disclosure under section 35(1)(b) of FOIA;

Ground 2: the Commissioner erred in concluding that no part of the minutes could be released;

Ground 3: an error in paragraph 14 undermines the reasoning of the Decision Notice;

Ground 4: the Commissioner failed to take steps in relation to the delay by the Cabinet Office in dealing with his request for an internal review of the refusal to disclose the disputed information.

Ground 1

13. It is accepted by all parties that the disputed information falls within the scope of the exemption in section 35(1)(b) of FOIA:

Information held by a government department...is exempt information if it relates to –

(a)...

(b) Ministerial communications;

14. “Ministerial communications” are defined by section 35(5) of FOIA as including proceedings of the Cabinet or any Cabinet Committee.

15. This is a qualified exemption and therefore the information must be disclosed unless the balance of the public interest lies in favour of maintaining the exemption rather than disclosure.

16. We were assisted by two witness statements provided in this case by senior civil servants; from the Deputy Director Europe dealing with issues relating to relations between the UK Government and those of Romania and Bulgaria, and from the Director and Deputy Head of the Economic and Domestic Affairs Secretariat in the Cabinet Office dealing with issues relating to the formulation or development of Government policy and Ministerial Communications.

17. The Cabinet Office submits that as there has been no direct challenge, disagreement or dispute to the evidence, it follows that it should be taken at face value, not readily gainsaid and given considerable weight accordingly.

18. The Appellant challenges the “veracity” of the witness statements but does not explain why. We are mindful of the fact that the Appellant has had sight only of a redacted version of the full witness statements with which we were provided. References to the specific content of the disputed information have been edited out. It is therefore part of our

responsibility to review those statements with care in light of the Appellant's arguments.

19. We do not consider the Cabinet Office to submit that we must accept the witness evidence without question, rather, that we should reject that evidence only if we have a reason for so doing.
20. In this case, we have accepted the majority of the evidence of the senior civil servants. The one area in which we do not give much weight to the evidence is in respect of what has become known as the "chilling effect" argument, that is, an argument to the effect that Ministers and advisers, inhibited by the possibility of public disclosure, would *"inevitably be less candid and robust in their approach and more guarded and defensive"* and may *"shy away from controversial areas, avoid frank criticisms of individuals or ideas, spend time framing things in more diplomatic language or divert attention towards the addition of qualifications or contextual points needed to pre-empt ill-informed or unjustified criticisms."* There is no evidence before us that this "chilling effect" has been felt since the FOIA came into force. Section 35 is a qualified exemption and therefore a request for the disclosure of Cabinet minutes will always be subject to the balance of the public interest. Parliament decided to make this a qualified rather than an absolute exemption, which indicates either that Parliament did not consider the "chilling effect" to be an "inevitable" consequence or that, even if it did, there may be circumstances in which, despite that effect, the public interest favours disclosure. In this case, based on the evidence presented, we have given little weight to the witness evidence in respect of the "chilling effect" of disclosure.
21. In favour of disclosure, the Appellant argues that the decision made in 2006 may have been based upon the same flawed study that led to the Government's "failure" in respect of the decision not to impose substantive work restrictions in respect of countries that acceded to the EU in 2004. It is apparent from the fact that restrictions were put in place for Romania and Bulgaria, the two countries that acceded to the

EU in 2007, that the flawed study, if it existed, could not have been relied upon at that stage.

22. We agree with the findings of the Commissioner in his Decision Notice that, although there was a general public interest in improving transparency and openness of the Cabinet Office, and a particularly strong public interest in the disclosure of Ministerial communications concerning the issue of immigration from EU accession countries in Eastern Europe, this public interest in disclosure is outweighed by the public interest in maintaining the exemption for the following reasons:

- i) The Minutes include content attributable to individual Ministers, either by name or by the nature of the subject matter recorded. A high number of those involved remain in front line politics and may well return to Government in the near future.
- ii) The Minutes provide some insight into how individual views held by Ministers contributed to the formation of the collective Cabinet decision. We consider that the arguments advanced by the Cabinet Office, particularly as set out in the witness statement of the Director and Deputy Head of the Economic and Domestic Affairs Secretariat in the Cabinet Office, in respect of the convention of collective ministerial responsibility is a factor in favour of maintaining the exemption which carries significant weight. We agree with the Cabinet Office that this is an additional and free-standing public interest factor which exists independently of the arguments regarding the need to provide a “safe space” or avoid the “chilling effect”, to which we attached little weight in this case.
- iii) The public interest in the issue of EU immigration was not only a relevant factor in favour of disclosure but also in maintaining the exemption given the sensitivity of the issue, particularly in respect of the possible adverse effect on relations with Romania

and Bulgaria. The Embassy of Romania in London expressed strong opposition to the employment restrictions and the concerns raised support our view that this remains a sensitive issue.

- iv) The issue of low-skilled migration was, and remains, an issue of high public interest and much public debate with a high profile in the media. It highlights further the weight of the public interest in ensuring that the Government is capable of carrying out an effective policy-making process where the convention of collective ministerial responsibility is engaged. We placed significant weight of the evidence of the Director and Deputy Head of the Economic and Domestic Affairs Secretariat in the Cabinet Office that *“(t)he premature disclosure of these policy discussions could lead to such external pressure from vested interest or sections of the media and public that the adoption of difficult but necessary policy choices would be impossible.”*
- v) The issue of employment restrictions is ongoing. It was “live” at the time of the request in 2010 and remains current as the restrictions have been extended until the end of 2013. In our view, having considered the content of the disputed information not seen by the Appellant, disclosure of this information in advance of a decision to be made next year would not be in the public interest. We disagree with the Appellant’s submission that as the information is now more than five years old means that there is a reduced case for withholding it. In our opinion, in the context of this issue, very little time has passed and the issue remains a highly contentious issue of government policy.
- vi) A significant amount of information is already in the public domain in respect of explaining the rationale for imposing the employment restrictions. The public interest in understanding how the Government took into account concerns about the impact of Romanian and Bulgarian accession to the EU on UK

employment when taking the decision to impose employment restrictions has therefore been met to a great extent and the public interest in disclosure is correspondingly lessened.

23. This ground of appeal is therefore dismissed.

Ground 2

24. The possibility of redaction was considered by the Commissioner in the Decision Notice.

25. We do not agree with the Appellant's submissions in respect of the age of the disputed information in relation to the possibility of redaction.

26. As we have already pointed out, unlike the Appellant, we have had the benefit of seeing the disputed information and have considered afresh the question of whether any parts of the disputed information could be edited to allow at least partial disclosure. The Appellant suggests that individual names could be redacted. Although the names of the attendees could be redacted, the Minutes record the majority of the discussion without attributing by name. The identity of individual ministers can be inferred from discussion of their area of responsibility. As we stated above, a high number of those involved remain in front line politics and may well return to Government in the near future.

27. We do not consider that it would be practicable or meaningful to edit or redact the disputed information in the way envisaged by the Appellant or at all.

28. This ground of appeal is therefore dismissed.

Ground 3

29. The Appellant submits that paragraph 14 of the Commissioner's Decision Notice is *"erroneous and contains argument that is not supported by the Freedom of Information Act 2000 or by authorities."* He argues that this undermines the whole Decision Notice reasoning.

30. The Commissioner concedes that there is a typographical error in paragraph 14 but denies that any confusion arises; the decision as a whole and particularly the summary of the same point in paragraphs 15 and 16 makes the intended reasoning abundantly clear.

31. We agree with the Commissioner; the obvious error in paragraph 14 does not invalidate the entire Decision Notice.

32. This ground of appeal is dismissed. However, the error in paragraph 14 should be corrected and we make the following direction:

In the final line of Paragraph 14 of the Decision Notice, the word “disclosure” is to be replaced with the phrase “maintaining the exemption”.

Ground 4

33. The Appellant submits that the Commissioner should have ordered the Cabinet Office to take steps to account for *“the unreasonable delay and failure to carry out the internal review in a timely fashion.”*

34. The Commissioner’s powers in respect of Decision Notices are set out at section 50 of FOIA. If a public authority had breached any of the requirements in sections 1(1), 11 or 17 of FOIA then the Commissioner must specify the steps to be taken by the public authority for complying with those requirements.

35. The Commissioner specifically noted in his Decision Notice that the Cabinet Office’s handling of the Appellant’s request for an internal review involved a “very lengthy delay” but that involved no contravention of sections 1(1), 11 or 17 of FOIA and the Commissioner was not under a duty therefore to require the Cabinet Office to take any steps.

36. In so far as this ground amounts to a complaint that the Commissioner should have exercised his powers under section 48 of FOIA to issue a Practice Recommendation or section 50 of FOIA to issue an

Enforcement Notice, these are matters in respect of which this Tribunal has no jurisdiction.

37. In any event, we are unsure when the request for an internal review was made in order to be certain as to the length of the delay by the Cabinet Office. We have seen an email from the Appellant dated 2 June 2010 in respect of the initial refusal to disclose the information which does not amount to a request for an internal review. The Appellant states specifically:

“Before I lodge a formal internal review, I have to raise one issue ...”

38. Certainly by 25 January 2011 the Appellant appears to have requested an internal review and sent two chasing emails; the first on 25 January 2011 pointing out that he had requested a review “months ago”, and the second on 22 March 2011. Despite this, the Cabinet Office did not conduct an internal review for many months, finally responding on 14 June 2011.

39. While we agree with the Commissioner that FOIA places no statutory obligation on a public authority to undertake an internal review within a specific time limit, we consider it inexcusable that a central Government department such as the Cabinet Office did not have in place an appropriate records management practice to avoid the unpalatable delay in this case. It may well be that in future the Commissioner should consider the possibility of a Practice Recommendation but this is not a matter within our jurisdiction.

40. This Ground of Appeal is therefore dismissed.

Conclusion and remedy

41. The Cabinet Office was entitled to withhold the disputed information on the basis of the exemption in section 35(1)(b) of FOIA. We therefore

uphold the Decision Notice, with the correction of the error in paragraph 14, and dismiss this Appeal.

42. Our decision is unanimous.

Signed:

Annabel Pilling

Tribunal Judge

21 May 2012