Tribunals Service
Information Tribunal

Appeal under section 57 of Freedom of Information Act 2000

Information Tribunal Appeal Number: EA/2008/0073
Information Commissioner's Ref: FS50126011

Heard at Field House, 15 Bream's Buildings, London EC4A 1DZ	**Determination Promulgated**
On 16 December 2008	**27 January 2009**

BEFORE

CHAIRMAN

Murray Shanks

and

LAY MEMBERS

MICHAEL HAKE AND ANNE CHAFER

Between

CABINET OFFICE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Eleanor Grey

For the Respondent: Timothy Pitt-Payne

Subject areas covered:

Formulation or development of government policy s.35(1)(a)

Ministerial Communications s.35(1)(b)

Public interest test s.2

Cases referred to:

Campaign Against Arms Trade EA/2006/0040, 26.8.08

DfES EA/2006/0006, 19.2.07

ECGD v Friends of the Earth [2008] EWHC 638 (Admin)

OGC v Information Commissioner [2008] EWHC 774 (Admin)

Secretary of State for Work and Pensions EA/2006/0040, 5.3.07

Determination

(1) The appeal is dismissed and the Information Commissioner's decision notice dated 5 August 2008 is upheld.

(2) Subject to commencement of an appeal under section 59 of the Act the public authority must communicate the disputed information to the complainant by 27 February 2009.

(3) The contents of this determination shall remain confidential to the parties (including Ministers) and not be published until 27 February 2009 or (in the event of an appeal) until the appeal court otherwise orders.

Reasons for Determination

Background facts

1. On 1 May 2004 eight Central and Eastern European countries (known as the A8) joined the European Union. The Accession Treaty provided that existing Member States could, as a derogation from the usual position under EU law, regulate access to their labour markets by A8 nationals for a transitional period of up to five years and, if there were serious disturbances or threats to the relevant country's labour market, for a further period of two years. The European Commission had to be informed if such regulation was to be continued after an initial two year period (i.e. beyond 1 May 2006).

2. Pursuant to that derogation the UK Government introduced through the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219) a "worker registration scheme" which (in summary) allowed A8 nationals to work in the UK but only if they were registered and which gave them a right to reside here *only* while registered and working for authorised employers or once they had worked in that way for 12 months. The scheme was designed to enable the Government to monitor the numbers of A8 nationals taking employment in the UK and to restrict their rights to claim benefits while seeking work (since benefits are generally conditional on the claimant having a *right* of residence). Although the Regulations on their face applied to A8 nationals working in the UK during the period 1 May 2004 to 30 April 2009, it was clear that the Government would have to make a decision about whether they should remain in force beyond 1 May 2006 in order to satisfy the requirement to notify the Commission accordingly.

3. On 24 April 2006 the Government announced in a written Ministerial statement that the Commission would be informed that the worker registration scheme would continue beyond 1 May 2006. The statement gave some background about the introduction of the scheme and went on:

> **The Government's decision to open its labour markets to nationals of the new member states immediately upon their Accession to the EU has been vindicated. Nationals of the new member states have entered the United Kingdom to work,**

have helped to fill vacancies in parts of the economy experiencing labour shortages and have helped to deliver public services. There is no evidence that the entry of workers from the new member states has impacted on the unemployment rate for resident workers.

It is, however, important that the Government should continue to be able to monitor the numbers of nationals of the new member states coming here to work and their impact on the labour market. That is why I have decided that the worker registration scheme will continue beyond 1 May 2006. The need for the scheme will, however, continue to be kept under review.

4. We were told that the decision to continue with the scheme had been taken in November 2005 following its consideration by a meeting of the Ministerial Working Group on Asylum and Immigration in October 2005. That Working Group had been set up by the Prime Minister in July 2005 to support the work of the Asylum and Migration Cabinet Committee. Although the Working Group was not itself able to take the decision in question, it was part of the Cabinet Committee system and the practice and expectation was that its conclusions would be endorsed by the Asylum and Migration Cabinet Committee itself and become collectively agreed Government policy.

The course of proceedings

5. On 10 May 2006 Mark Boleat, the Chairman of an organization called the Association of Labour Providers, made a Freedom of Information Act request of the Cabinet Office for "a copy of the Cabinet Office papers prepared for a meeting of the Asylum and Migration Working Group meeting in October 2005 which took the decision to continue the Accession States Worker Registration Scheme". The Cabinet Office accepted that such information was held but refused the request on the basis of the exemptions in sections 35(1)(a) and (b) of the Act. That refusal was upheld following an internal review by letter dated 10 July 2006.

6. On 13 July 2006 Mr Boleat complained to the Information Commissioner who issued a decision dated 5 August 2008 in which he found that, although sections 35(1)(a) and (b) were engaged, the public interest in disclosure outweighed the public interest in maintaining the exemptions and ordered the Cabinet Office to disclose the information. Against that decision the Cabinet Office appeals to this Tribunal. The issue for the Tribunal is whether the Commissioner was correct in his conclusion about the public interest balance.

7. The Tribunal was provided in confidence with the disputed information: it consists of one paper dated 21 September 2005 prepared by officials in the Economic and Domestic Affairs Secretariat of the Cabinet Office for presentation to the Working Group meeting in October 2005. The paper is described as a "Note by the Secretaries" and marked "Restricted". It gives some factual background about the introduction and working of the worker registration scheme and then sets out the arguments in favour of closing and retaining it respectively. We were told that this case was the first in which the Tribunal had considered a document of this nature.

8. The Tribunal was also provided with an open bundle of documents and received open and closed evidence from two officials, Robin Fellgett, who has been the Director of the Economic and Domestic Affairs Secretariat since 2003, and Seonaid Webb, who has been at the Home Office for five years and Head of European Operational Policy for the last 10 months. The oral evidence took longer than anticipated and there was therefore no time for final submissions at the hearing so that it was agreed on all sides that submissions would be made in writing. Very full and helpful written submissions (mostly closed) were sent to the Tribunal after the hearing and the members of the Tribunal met in private to consider their decision in the light of these on 9 January 2009.

The legal framework

9. The relevant provisions of the Act are as follows:

1(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…

2…

(2) In respect of any information which is exempt information by virtue of [section 35(1)] section 1(1)(b) does not apply if or to the extent that…

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information…

35(1) Information held by a government department…is exempt information if it relates to

(a) the formulation or development of government policy

(b) Ministerial communications…

(5) … "Ministerial communications" … includes, in particular, proceedings…of any committee of the Cabinet…

10. On an appeal such as this the Tribunal can review the facts and reach its own conclusion as to the public interest balance in the particular case in question and as to whether the information ought therefore to have been communicated by the public authority. The public interest balance must be considered as at the date of the public authority's decision (including any review: see *Campaign Against Arms Trade* case EA/2006/0040, 26.8.08 at para 53), so that matters arising after July 2006 are irrelevant in this case save in so far as they throw light on the factual situation before that date. The balance to be struck is between the *public* interest in disclosure (rather than the private interest in disclosure of the requester) on the one hand and the public interest in maintaining the exemption (rather than any general public interest in non-disclosure) on the other. There are two binding High Court authorities to which we were referred which are relevant to the proper approach to the application of the public interest test in section 35 cases, namely *ECGD v Friends of the Earth* [2008] EWHC 638 (Admin) (in particular paras 25 to 38) and *OGC v Information Commissioner* [2008] EWHC 774 (Admin) (in particular paras 68 to 80); those cases refer to and approve passages from the decisions of this Tribunal in *DfES* (EA/2006/0006, 19.2.07) and *Secretary of State for Work and Pensions* (EA/2006/0040, 5.3.07) to which we were also referred; we propose to follow the approach indicated by all these cases.

11. As to the public interest in disclosure of information under the Act, in the *OGC* case (at para 71) the High Court approved the following statement of the Tribunal *Secretary of State for Work and Pensions*:

[T]here is an assumption built into FOIA that the disclosure of information by public authorities on request is in itself of value and in the public interest, in order to promote transparency and accountability in relation to the activities of public authorities…

Transparency and accountability can in turn give rise to more informed public debate and better decision making by government.

12. The public interest in maintaining the section 35 exemptions is, in the widest sense, also good government. As to section 35(1)(a), there is a public interest in

maintaining the confidentiality of discussions and advice within and between government departments on matters leading to a policy decision: this is to allow ministers and officials to have a full and frank exchange and to have the time and space to explore options and "hammer out" policy safe from the threat of "lurid headlines" (see paras 38 and 40 of *ECGD* decision and paras 100-101 of *OGC* decision) so that they can reach good policy decisions. As to section 35(1)(b) there is also a specific public interest in maintaining the confidentiality of ministerial communications arising from the convention of collective responsibility of Ministers of the Crown, which is that once a policy decision has been reached by the Government it has to be supported by all ministers whether they approve of it or not unless they resign: that convention and the free discussion between Ministers may be prejudiced by "premature disclosure" of the views of individual Ministers.

13. Bearing in mind that legal framework we turn to consider the weight of the respective public interests as at July 2006 in the circumstances of this particular case (which include in particular the content of the information itself and the background facts which we have described).

The public interest in disclosing the information

14. The contents of the paper would certainly have been of considerable legitimate interest to the public. It concerned an issue which would directly affect the lives of A8 nationals wanting to work here and their prospective employers and, less directly, the population at large. Its broad subject matter, immigration, was (as it will no doubt remain) sensitive and controversial and the decision about extending the scheme was itself controversial. It showed the considerations which were regarded by Cabinet Office officials as being important in making that decision. And, more generally, it also showed the inner workings of Government and the nature of the considerations which might bear on decisions of this kind. We would note at this stage our clear view that the fact that the paper was drafted for a particular purpose and addressed to a particular audience (namely Ministers) and was not designed for publication did not in itself in any way lessen the public interest in its disclosure: its very interest to the public lay in the fact that it was addressed to Ministers and drafted to assist them to make a decision.

15. The Commissioner in his decision notice also attached considerable weight to what he found to be the "lack of public engagement in the process by which the decision was reached" and the fact that the "factors which accounted for the reasons behind the Government's decision [were] not widely known or understood". The Tribunal finds the factual position on these matters to be as follows. As to the first, Ms Grey for the Cabinet Office accepted in her open written submissions that there had indeed been no formal public consultation exercise to obtain the views of "stakeholders" or the public at large before the decision was made. However, Ms Webb gave evidence that the worker registration scheme was discussed by an "Illegal Working Stakeholder Group" on which many stakeholders, including Mr Boleat's organisation, were represented and which met regularly in 2005 and 2006. However, apart from a discussion at a meeting of the Group in July 2005 disclosed by the public minutes (and referred to in Mr Pitt-Payne's written submissions), there is no evidence that the specific question of whether the scheme should be continued (as opposed to the practical operation of the scheme) was discussed in this Group before the decision was taken, notwithstanding that the relevant Minister apparently suggested at the July 2005 meeting that the matter be considered at a later meeting to tie in with the review which was to take place before a decision was taken. As to the second matter, namely the public's understanding of the reasons for the decision, it is right, as stressed by the Cabinet Office, that there was substantial information in the public domain about how many A8 nationals were working in the UK and what jobs they were doing which had been disclosed by the requirement to register under the scheme, but the only information about the reasons for the decision to continue the scheme from 1 May 2006 which was in the public domain was that set out in the Ministerial statement we refer to at para 3 above.

16. Bearing in mind the facts as we find them, we consider that the Commissioner may have attached somewhat too much weight to these matters but that they were nevertheless important and did go to increase the public interest in disclosure. The Commissioner was clearly not right to say that disclosure would "…enable the public to fully understand the reasoning behind the decision taken…" (not least because the paper set out arguments both ways rather than making a specific recommendation and, in any event, as Mr Fellgett pointed out, the actual

conclusion, even of the Working Group, would have been based not just on the arguments in the paper but on the collective knowledge and experience of Ministers). Nevertheless, disclosure would have enabled the public to have a better understanding of the considerations that were thought to be of relevance to the Government's thinking about the matter and would have enabled those who had views to make more constructive representations on any review; it would also have assisted the public more generally by allowing them to see the nature of the considerations which were thought relevant, which may have assisted interested parties making representations in other cases, including in relation to the A2 decision to which we refer below.

The public interest in maintaining the exemptions

17. Three main factors were relied on by the Cabinet Office in favour of maintaining the exemptions in this case:

    (1) The likely damage to the principle of collective Ministerial responsibility if disclosure had been made;

    (2) The language used in the paper meant that its disclosure would have had a "direct" (detrimental) effect and an "indirect" effect on the drafting of papers of this nature in future cases;

    (3) The likely impact on ongoing policy-making if disclosure had been made.

18. ***Collective Ministerial responsibility***: Mr Fellgett explained in his evidence that a "Note by the Secretaries" is often prepared because there is an existing disagreement between Ministers on an issue on which a decision has to be taken. He said that a well informed reader of the paper might therefore infer that there was such disagreement in this case and that this would damage the principle of collective Ministerial responsibility.

19. The Tribunal was not persuaded by this argument. Even assuming that there was a serious risk that disclosure of the paper would have lead to the inference being drawn that there had been a disagreement between Ministers at the time it was

prepared, we do not see how such an inference would have undermined the collective responsibility principle. The paper set out the pros and cons neutrally without assigning views to any Minister or department so that the matter could be debated by the Ministers on the Working Group and a conclusion reached: that is exactly what the public would expect to happen. The collective responsibility principle requires Ministers to support a decision once it has been reached, not to agree about everything before decisions have even been taken. The principle would only have been at risk of prejudice if specific views had been rehearsed in the paper which could then have been used to embarrass those holding them if a decision had gone against them; we do not think that any remotely competent Minister would have had any difficulty dealing satisfactorily with questions suggesting disagreements within Government based simply upon the premise that there must have been some disagreement at an earlier stage given the nature of the paper.

20. ***The language of the paper***: Mr Fellgett gave evidence to the effect that the paper was deliberately drafted in a succinct and candid way for a specific audience and was not designed for publication and he and Ms Webb pointed to a number of statements in it which were "unguarded", "unqualified" or otherwise misleading or "unhelpful" to the public and which would have been omitted or put differently if the paper had been drafted with a view to publication: this was described in Ms Grey's submissions as the "direct" effect. Further, it was Mr Fellgett's evidence that, if disclosure of a paper such as this one had been required under the Act, there was a risk that Ministers would have started to require other similar papers to be drafted in a way that was targeted for public consumption and that they would therefore have become more carefully drafted, more guarded, less frank and hedged around with unnecessary detail and qualifications. This would have made them substantially longer and less accessible and some relevant information would be omitted altogether. The Tribunal accept that such a development (described as the "indirect" effect) would clearly have been against the public interest lying behind the section 35 exemption.

21. *The "direct" effect*. We have considered the statements in the paper about which concern was expressed and our conclusions are as follows:

(1) There is a reference in the paper to possible infraction proceedings by the European Commission in respect of the restriction on benefit claims by A8 work-seekers which was part of the worker registration scheme. This reference, Mr Fellgett said, introduced a real risk that the Commission would be lobbied successfully to bring proceedings to clarify the legal position which meant that the Government would be involved in legal proceedings which might otherwise be avoided; that, the argument would run, would have been contrary to the public interest in good government underlying the section 35 exemption. We are not at all sure that it would be contrary to the public interest for the Commission to decide to bring proceedings if it was persuaded that they were appropriate but, in any event, we cannot accept that the risk of proceedings being brought would have been increased more than minimally by this reference; it seems to us that if there was anyone who cared enough to take the trouble to lobby the Commission in this way they would hardly have required the encouragement of that reference to do so.

(2) There is a statement in the paper to the effect that there had been lobbying by employers to close the scheme but that the employer lobby had "…been contained and managed effectively within the Illegal Working Stakeholder Group". Ms Webb said that this statement would have been worded differently or more fully if the paper was for publication; Mr Fellgett said that all that his team of officials would have meant by this phrase was that there would not be a "political explosion" if the scheme was continued. It seems to us probable that the real concern here is potential embarrassment for the Government vis-à-vis the employer lobby and the members of the IIlegal Working Stakeholder Group (who include, of course, Mr Boleat). We are clear that the overall public interest in relation to this narrow point would have been that the statement be disclosed in its raw form so that the public could judge its significance for themselves.

(3) As to the balance of the points made by Ms Webb we agree with the submission of Mr Pitt-Payne for the Commissioner that they were largely matters of detail and nuance and did not establish that the public would have been misled (if that is relevant) or that disclosure would otherwise be significantly harmful to good government. We note that Ms Grey in her submissions expressly accepted that

there was no evidence to suggest that the release of the paper would have caused damage to community relations.

22. *The "indirect" effect*. We accept that there was a risk that the "indirect" effect described by Mr Fellgett would have resulted if this particular paper had been required to be disclosed under the Act in July 2006. But the evidence (of necessity) is evidence of a risk, not evidence of past fact, and the Tribunal considers that this risk was small and/or not a risk which ought to have weighed heavily in the balance for these reasons: (a) although we accept that there was a risk that Ministers would have started to require officials to draft papers like this one in a way which tended to make made them longer, more inaccessible and less frank and complete, it would not really have been in their interests (let alone the public interest) to do so and it may have involved a breach of the Ministerial Code of Conduct (a copy of which was provided to us and which unsurprisingly requires Ministers not to ask civil servants to act in any way which conflicts with their professional obligations as such); (b) any judgment as to the likely response of officials in the Cabinet Office to such pressure would have taken account of the expectation that they would continue to act with courage and independence and in accordance with their normal professional obligations as civil servants (and not, for example, deliberately leave important relevant considerations out of a Cabinet paper).

23. ***Impact on policy-making***: The government policy decision to which the disputed information in this case was relevant was the decision to extend the worker registration scheme from 1 May 2006. That decision was taken in November 2005 and announced in April 2006. Ms Grey accepted in her written submissions that the relevant policy had therefore been "settled" by May 2006 (and, it must follow, July 2006). But, she submitted, it had only been settled recently and the "safe thinking space" period was still current. She also submitted that there was a closely related decision to be taken in late 2008 or early 2009 as to whether to extend the scheme for a further two years under the terms of the derogation.

24. The Ministerial statement announcing the decision referred to keeping the need for the scheme under review and Mr Fellgett gave oral evidence to the effect that the decision made in November 2005 provided for a review one year later, i.e. in Autumn 2006 (although that part of the decision was not publicised and was not

required under the EU derogation). Given the existence of the proposed review Mr Pitt-Payne in his submissions accepted that the public interest in protecting the safe thinking space had not completely diminished after 1 May 2006, though he said it had reduced. We would agree with that assessment. We also accept his submission that in reality any review would have been unlikely to be adversely affected by disclosure of the paper in July 2006 given its content (namely a rehearsal of arguments for and against continuing an established policy without any naming of or attribution of views to Ministers or officials); indeed, as already indicated in para 16 above, we would agree with his submission that its disclosure could have been beneficial in that it would have enabled the public to make a more informed contribution to any review. We do not accept that the decision to be made in late 2008 or early 2009 was of any relevance to the debate: the criteria to be applied in making that decision were to be quite different and it was to be made in the light of circumstances existing several years in the future.

25. Ms Grey also submitted that the decision which would have to be made during 2006 in relation to the application of a similar derogation to nationals of Bulgaria and Romania who were to accede to the EU on 1 January 2007 (the A2) would have been adversely affected by the disclosure of the paper in question in this case. It was accepted that the decision on the A2 was separate from the decision on the A8, as was expressly recognised in the paper. The concern as expressed by Ms Webb was that disclosure of the A8 paper during 2006 could have "clouded the issues" on A2 but it seemed to the Tribunal that the concern she was expressing was really that it would have opened up the debate further, which is something we would regard as having been in the public interest. Mr Fellgett expressed the concern again in this context that the disclosure of the paper would imply there was disagreement between Ministers about extending the worker registration scheme on A8 which would have impeded the policy process on A2. We have already dealt with the point about Ministerial disagreement in a different context in para 19 above.

Conclusion and result

26. In the light of the considerations which we set out in paras 14 to 25 above we are of the view that in all the circumstances of this case as at the relevant date the public interest in disclosure of the disputed information substantially outweighed the public

interest in maintaining the exemption at section 35(1)(b) and less overwhelmingly but nevertheless conclusively outweighed the public interest in maintaining the exemption at section 35(1)(a).

27. It follows that the Commissioner's decision was in accordance with the law and the Cabinet Office's appeal must be dismissed. We will allow a month for the disclosure of the information and place an embargo on the publication of this determination for the same period in case of an appeal.

28. Our decision is unanimous.

Signed:

Murray Shanks
Deputy Chairman Date 27 January 2009