IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0310
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS 50514999
Dated: 12 November 2014

Appellant:	**HOME OFFICE**
Respondent:	**INFORMATION COMMISSIONER**
Heard at:	**FIELD HOUSE, LONDON**
Date of hearing:	**18 MAY 2015**
Date of decision:	**29 June 2015**

Before

ROBIN CALLENDER SMITH
Judge

and

ROSALIND TATAM and DAVID WILKINSON
Tribunal Members

Attendances:

For the Appellant: Ms Jennie Thelen, Counsel instructed by GDL.
For the Respondent: Mr Robin Hopkins, Counsel instructed by the Information Commissioner

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2014/0310
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Subject matter: FOIA 2000

Qualified exemptions

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

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 12 November 2014 and dismisses the appeal.

REASONS FOR DECISION

Background

1. From 22 July 2013 to 22 August 2013 the Home Office conducted a pilot project – named Operation Vaken – where a number of mobile billboards were driven around in six London boroughs with messages targeted at illegal immigrants.

2. The billboards made it clear this was a Home Office campaign. They carried the prominent question: "In the UK illegally?" together with the messages "106 Arrests Last Week In Your Area", "Go Home Or Face Arrest" (and details for a text number for free advice and help with travel documents) and a strapline along the bottom stating "We can help you to return home voluntarily without fear of arrest or detention".

3. The evaluation report published in October 2013 noted that, while the communications phase of the project concluded on 22 August 2013 the pilot itself continued until 22 October 2013 to provide a three-month period to allow for Emergency Travel Documents to be obtained and for the completion of the voluntary departure process.

4. By 22 October 2013 there had been 60 voluntary departures which the Home Office believed could be directly attributed to Operation Vaken. At the time of the evaluation report a further 65 cases were being processed.

5. The campaign attracted national comment for the tone and content of its messages.

The request for information

6. On 30 August 2013 a member of the public wrote to the Home Office requesting information in the following terms:

   > Please reveal all correspondence sent/received by Theresa May in July and August 2013 re. the "Go Home" campaign.
   >
   > (Please include both parts of the campaign: Vans of Hate and Glasgow Posters).[1]

7. The Home Office issued a holding response to this FOIA request on 26 September 2013 and responded substantively on 21 October 2013. It refused the information request, stating that the information was exempt by virtue of section 35 (1) (a), the exemption relating to the formulation or development of government policy.

8. The Requestor asked for an internal review of this refusal on 21 October 2013. It was only following the intervention of the Information Commissioner that the Home Office responded with the outcome of the internal review – five months later – on 24 March 2014.

9. The refusal under section 35 (1) (a) was maintained and the exemption provided by section 40 (2) FOIA in relation to personal information was also relied upon.

10. During the course of the Information Commissioner's investigation – which he started in February 2014 because of the delay by the Home Office in

the completion of its review – the Home Office suggested that the scope of the request was not clear and that it had been interpreted as being only for internal correspondence.

11. The Information Commissioner responded that the scope of the request, in his view, was clear and that it covered all relevant correspondence both internal and external.

12. The Home Office stated it did hold external correspondence within the scope of the request but withheld that under the exemptions provided by section 36 (2) (b) (ii) in relation to the inhibition to the free and frank exchange of views and section 36 (2) (c) in relation to other prejudice to the effective conduct of public affairs.

13. The Information Commissioner concluded that the public interest in maintaining section 35 (1) (a) FOIA did not outweigh the public interest in disclosing the information.

14. In relation to section 40 FOIA (and the operation of the Data Protection Act 1998 in relation to personal data) there were two categories that he considered.

15. The first related to information within an email about an individual who had voluntarily departed from the UK. That individual was not named within the email but, by way of jigsaw identification, might be. On that basis the Information Commissioner accepted that there was sufficient detail in the email that could enable others to identify the individual.

16. The second related to the names of officials and staff members. In relation to those he concluded that disclosure of the names of junior officials would be in breach of the first data protection principle.

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[1] It was stated during the course of the oral appeal hearing on 18 May 2015 that there had been no correspondence sent or received by the Home Secretary that was held in relation to the *Glasgow Posters* element of this information request.

17. As a result, he concluded that the Home Office was required to disclose the information covered in the section 35 (1) (a) analysis with the personal data covered by section 40 (2) redacted [Paragraph 46 of the DN].

18. In relation to section 36 FOIA he found that it was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information to which it related.

The appeal to the Tribunal

19. The Home Office, in its Grounds of Appeal, specifically challenged three areas.

    (1) Firstly, the Decision Notice had characterised all the Information as "factual". However, the Disputed Information should not have been so categorised because it concerned the shaping of the policy and that had largely occurred at the development stage of the pilot project.

    (2) By grouping the Disputed Information in with the remainder of the Information as purely factual, the Commissioner had failed properly to assess the important public interest in maintaining the exemption with respect to that subset of the Information.

    (3) When properly analysed, the interest in maintaining the exemption in respect of the Disputed Information outweighed the public interest in disclosure because:

        (a) The Disputed information related to the formulation of policy.

        (b) Much of the Disputed Information was created at point when the policy was being developed. Some of the Disputed Information related to the implementation – and therefore the evaluation – of the pilot scheme.

(c) There was a strong public interest in maintaining a safe space for the development of public policy away from the possibility of disclosure in which that process could be carried out and that public interest should have prevailed.

(4) Secondly, there had been a failure to give due regard to the fact that the Disputed Information related to an ongoing policy-making process. The Disputed Information went to the mechanism of government, including the way in which the policy was developed and the decisions were taken. It also demonstrated ongoing evaluation of that policy. That fell squarely within the area in which the "safe space" argument could offer most protection.

(5) That error had carried through, resulting in insufficient weight being given to the need to provide a safe space to debate live policy issues away from external interference and distraction. Properly construed, that interest outweighed any interest in disclosure.

(6) Thirdly, the information request was solely correspondence which was "sent/received by Theresa May in July and August 2013". The Decision Notice had failed to distinguish between emails which had been sent to the Home Secretary in July and August 2013 and the emails that predated that request but which were included as part of an email chain sent between July and August 2013 and which did not relate substantively in any meaningful way to the July/August 2013 correspondence. The emails within the Disputed Information fell within that category.

(7) Although the Home Office had made clear its position that the Disputed Information fell outside the scope of the request, the Decision Notice had failed to deal with that position.

(8) The words “received by” should be construed as applying only to correspondence received, for the first time, on that date. Any contrary construction interpreted the request over-broadly.

Evidence

20. The Tribunal heard oral evidence and submissions in open court and in closed session as well as considering open and closed material.

21. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.

22. In *Bank Mellat v HMT (no.1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:

    i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.

    ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.

    iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.

    iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court’s reasoning, and the evidence and the arguments it has received.

23. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

    i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal’s function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

24. The closed bundle in this appeal contained the disputed information. It was necessary for the Tribunal to see the disputed information – and consider the redacted elements of the witness statement of the Home Office's Director of the Immigration Enforcement for London and the South of England in order to reach its decision.

25. The Tribunal has considered carefully and rigorously the Appellant's points and concerns already expressed in the notice of appeal and in other representations and submissions.

26. It has, however, been necessary to include some of its reasoning in a Closed Annex. For the rest, it intends the reasons which follow to be self-explanatory without referring to the detail of the closed elements of the information requested.

27. The oral evidence was given by Paul Wylie, the Director of Immigration Enforcement for London and the South of England at the Home Office. He had been in post since January 2013 and had worked at the Home Office since October 2004.

28. He adopted the Open portion of his witness statement dated 27 March 2015. He explained that in September 2012 he began policy development discussions with colleagues in the Communications Directorate of the Home Office to "explore opportunities for promoting voluntary departures from the UK". This became the Operation Vaken Pilot.

29. The origin for this was from his own "front-line experience of the financial and logistical limitations of solely focusing on arrest, detention and enforced removal of illegal migrants". He explained that it cost approximately £15,000 for each removal if it was enforced in comparison to only £1000 for a voluntary departure.

30. There were also a finite number of arrest officers, detention beds and escorts on flights available for enforced removal and this provides a "strong argument for supplementing the enforced removals with a greater focus on, and increase of, voluntary departures".

31. In terms of the chronology of Operation Vaken, he identified the following key points:

    (1) September 2012 – February 2013: discussions with the Communications Directorate, strategy and front-line staff on the development of the tactics involved in such an immigration enforcement scheme.

    (2) 4 March 2013: after agreeing with colleagues internally (the then Director of Enforcement and the then Chief Executive of the UK Border Agency) that the proposed pilot policy fitted with the "wider strategic aims of the UK Border Agency" and initial submission was sent to the Immigration Minister for his policy development steer.

    (3) 25 March 2013: a further iteration of the advertising material was submitted to the Immigration Ministers office following significant amendments in response to the policy steers.

    (4) 26 March 2013: the Home Secretary announced to the House of Commons that the UK Border Agency would be dissolved and replaced with new Directorates within the main Home Office – Immigration Enforcement and UK Visas & Immigration – so that Ministers could better control the policy and operational effect of the immigration services. As a result, the submission of 25 March 2013 was never given to Ministers and further policy development was undertaken by the Communications Directorate, with his input, to reflect the emerging discussions relating to the new strategy for a new Directorate.

    (5) 20 May 2013: a further revised submission was provided to Ministers following internal discussions relating to the overall strategic and policy direction of the new Immigration Enforcement Directorate.

    (6) 22 July 2013: Operation Vaken commenced as a pilot project in six London boroughs.

(7) 26 July 2013 – 30 August 2013: the Operation Vaken Pilot resulted in significant media and political discussions. He decided to provide weekly situation reports each Friday for Ministers in relation to the policy, statistical, media, Parliamentary handling and legal issues relating to the pilot policy as it developed. The frequency of his reporting was high as the result of the media and political interest and the effect that interest could have on wider policy development.

(8) The Disputed Information included the covering emails which went with each of these situation reports.

(9) The Situation Reports had themselves been disclosed to the Requestor as a result of his FOIA request.

(10) 22 August 2013: the pilot ceased as planned in the six London boroughs. There was then a period of evaluation in a wider policy context.

(11) 22 October 2013: the Home Secretary announced to the House of Commons that the Operation Vaken Pilot policy had been evaluated and the decision had been taken not to continue it. She said that

> What I said to the right hon. Gentleman was that I did not have a flash of blinding light one day and walk into the Home Office and say, "I know, why don't we do this?" I have looked at the interim evaluation of the vans. Some returns were achieved, but politicians should be willing to step up to the plate and say when they think that something has not been such a good idea, and I think that they were too blunt an instrument. But we should also be absolutely clear about what used to happen under the last Government. If somebody came to the end of their visa, no one got in touch with them to say that they should no longer be staying here in the UK. That is now happening as a result of the changes to immigration enforcement. As a result of that work, during the last year some 4,000 people have left the UK. It is absolutely right that we do that, but we will not be rolling out the vans; they were too much of a blunt instrument.

32. He explained that the initial policy formulation and development phase between September 2012 and February 2013 had included discussions with frontline staff and included Immigration Officers who had established immigration surgeries in Gurdwaras in West London. Those officers had found that Indian nationals who were illegal migrants had come forward to depart voluntarily because they had been scared by high profile enforcement operations in West London. The local Indian community had been aware of the voluntary departure route because it had been used through immigration surgeries in the Southall Gurdwara and it was trusted locally because individuals attending at the surgeries were not arrested.

33. The hypothesis of the plan was to see whether voluntary departures would increase in a given area if (a) the risk of arrest of illegal migrants was made more visible and communicated better, (b) that the voluntary departure route existed and was available to illegal migrants as an alternative to being arrested and (c) that safe sites were established for immigration surgeries where illegal migrants could approach the Home Office safely, without fear of arrest.

34. At the same time that the Operation Vaken Pilot policy was being developed, the Home Secretary abolished the UK Border Agency on 26 March 2013. She tasked the new interim Director General with creating a new Directorate within the Home Office called "Immigration Enforcement", with a culture of "tough enforcement". That was separate from another new Director General area for UK Visas & Immigration.

35. Mr Wylie's position was that the Disputed Information related to the policy development of the pilot in the wider Ministerial context of a new Directorate being established. The Disputed Information originated in the context of an ongoing "free and frank exchange with Ministers" on wider immigration enforcement policy. The feedback of Ministers occurred in the context of the more strategic conversations being held with senior Directors at that time about the shaping of future immigration policy.

36. He believed that disclosure of the Disputed Information – particularly the emails from the Ministers' offices on 13 March and 11 June 2013 – would have a chilling effect on future policy development. That needed to be conducted in a safe space and disclosure would "adversely affect" the conduct of good government.

37. Immigration was regularly cited by polling agencies as an issue of national importance and debate. He believed that if such discussions and exchanges were put into the public domain, even in part, then they were likely to become high profile and widely commented upon in political circles and by the media.

38. In his view, that would lead

> …. to policy development becoming less radical and taking fewer considered risks…. While I accept that there is a public interest in immigration, in my view this interest also means that there can be a greater need for a safe space for Ministers and officials to discuss all of the options available. In my experience of immigration policy development, there are very few options with little or no political risk. The scale of illegal migration in the UK often means that there are no easy, uncontroversial options. Ministers often have to choose a “least bad” option, as all options entail some form of operational, financial and/or political risk. Against this backdrop, Ministers should be free to suggest a policy steer, which can then be developed and incorporated into a completed policy. They need the space to be able to suggest ideas, even more radical ideas, and see how they play out, in terms of policy development.
>
> If Ministers are not provided with a safe space in which to discuss these options and request further examination of them, then the method and quality of communication between Ministers and officials would also degrade. If Ministers felt that there was a danger these communications would be disclosed, they would feel more cautious in the speech, and move closer to speaking in “soundbites” rather than frank and open communication, which is clearly a more efficient and effective means of reaching mutual understanding. Ministers may feel that they must be seen to be appealing to the more populist external political and media views, without balancing these interests against the operational and financial realities of the circumstances. There is also the concern that Ministers would move away from written communications, to more face-to-face communications, with the same effect.

39. His position was that the principle of free and frank exchanges of information the policy development was built on the trust that such information will be withheld, so that all options – including the most radical – could be fully aired, evaluated to allow for a formal Ministerial decision to be made. The cumulative adverse effect on the relationship between Ministers and senior Government officials had to be considered.

40. He recognised that the exemption at section 35 (1) (a) FOIA was a qualified exemption and that the balance of the public interest had to be taken into account when deciding whether to disclose the information or maintain the exemption. He also recognised that – at the time of the Operation Vaken Pilot – there was a strong public interest in it and its outcome. He believed that did not equate to a public interest in disclosure of any information which related to it. The public interest had been recognised and met by the release of the weekly situation reports and the

publication of the evaluation report on the pilot project on 31 October 2013 and the Home Secretary's Written Ministerial Statement to the House of Commons on 22 October.

41. Both in the Open and Closed sessions – in response to questions asked by Mr Hopkins on behalf of the Information Commissioner – Mr Wylie agreed that the public had already been given quite a detailed insight into the purpose and the practical dynamics of the Project.

42. Mr Hopkins suggested that the emails that had been withheld were in fact anodyne in nature given the material that had already been released to the public. Mr Wylie maintained that was not the case and that the release would have a chilling effect in terms of officials such as him having the "safe space" to develop and discuss such matters with relevant Ministers.

Conclusion and remedy

43. The Tribunal has considered carefully whether there should be a closed, Confidential Annex to this decision further to support its reasons for deciding that the public interest in disclosing the withheld information outweighs the public interest in maintaining the qualified exemption.

44. This decision is not a unanimous one. The reasons of Tribunal Member David Wilkinson necessary involve reference to the Closed Material and – for this reason – they are contained in a Confidential Annex .

45. The difference between the Appellant Home Office and the Information Commissioner's position relates to a relatively small amount of material in covering emails that made up the broader body of information surrounding the situation reports.

46. It is in the context of the already published information in the situation reports and the public comments of the Home Secretary in the House of Commons at the end of the project that the Tribunal has concluded that

the withheld information should be made public. There is nothing particularly remarkable or compelling about the withheld information.

47. What the withheld information demonstrates is the unexceptionable but still reassuring fact that considerable care and attention was given by Home Office officials to reporting progress on the pilot so that proper ministerial oversight could be exercised. It is the Tribunal view that there is a public interest in knowing that and being able to see it.

48. A counterargument would be that there is already so much in the public domain about the requested information – minus the withheld information – that the public interest is not further served by disclosing anything more. The Tribunal does not accept that approach in the context of what is at the heart of the withheld information in this case

49. This distinguishes the current appeal from the "safe space" accorded in the FTT decision in *Weiss v Information Commissioner* [EA/2011/0191] where the information sought was 240 pages of documentation – including emails between policy advisers, senior officials and ministers - regarding a policy project of the Home Office to remove homeless EEA nationals.

50. In this appeal there is a general public interest in being able to understand policy discussions that took place within Government about the pilot project which was, in the end, not pursued further at the conclusion of a highly-publicised and scrutinised pilot.

51. The fact that the disputed information now at issue is small is not a reason for it not being disclosed.

52. The timing of the request came on the day the pilot phase of the project was concluded. The necessity for the "safe space window" had closed at that stage

53. The Tribunal agrees with the Commissioner’s characterisation that much of the disputed information is, in fact, factual in nature and does not contain opinions or subjective assessments. Disclosure will not harm the policy process or policy development. Officials will continue to report information such as this internally in appropriate terms.

54. The disputed information reveals the mechanisms by which decisions about this pilot were taken and this attracts a very strong public interest in favour of disclosure.

55. This was a controversial pilot and – in the context of the general debate about migrants and illegal immigration – there is very significant weight in the public interest being developed by enhancing the understanding of how such decisions came to be taken

56. The Home Office want a qualifier read into the request that it is only correspondence received by the Home Secretary for the first time in July or August 2013 that was being sought. The Tribunal cannot agree with that approach and finds as a matter of fact that the disputed information is within the scope of the request.

57. In terms of the Data Protection Act issues, the Tribunal has subsequently received a “key” in relation to the seniority of the individuals in the email chain and finds that the details should be not be disclosed on the basis that the individuals in question could reasonably expect them to be withheld.

58. The decision above – and its reasoning – represent the views of First Tier Tribunal Judge Robin Callender Smith and Tribunal Member Rosalind Tatam. Tribunal Member David Wilkinson disagrees with those reasons and their consequences. His reasons are contained in the Confidential Annex.

59. There is no order as to costs.

Robin Callender Smith
Judge
29 June 2015