

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 August 2008

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant wrote to the Cabinet Office to request 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 informed the complainant that the requested information is held but that it is exempt from disclosure under section 35(1)(a) and 35(1)(b) of the Freedom of Information Act (Formulation or development of government policy and Ministerial communications). The Cabinet Office also stated that it had concluded that the balance of the public interest lies in maintaining the exemptions. The Commissioner accepts that the information withheld from the complainant engages the specified exemptions but has concluded that in all the circumstances of the case the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information. The Commissioner therefore requires the Cabinet Office to provide the withheld information to the complainant.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 10 May 2006 the complainant wrote to the Cabinet Office to request "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".

3. The Cabinet Office replied to complainant on 31 May 2006, in which it informed him that the requested information is held but that it is exempt from disclosure under section 35(1)(a) and 35(1)(b) of the Act. It stated that it had concluded that the balance of the public interest lies in maintaining the exemptions and provided the following reasons for this decision (which are reproduced here as direct quotations):
 - We accept that there is a general public interest in transparency regarding how Government operates and how it reaches decisions, and in increasing public understanding of such issues.
 - However, in this case we consider that the public interest in maintaining the exemption outweighs these factors.
 - The requested paper was prepared for a Ministerial Working Group in late 2005. When formulating policy, officials must have space to develop policy and consider all possible options for Ministers to discuss. This makes for better quality policy decisions, which is strongly in the public interest.
 - The frankness of the advice to Ministers and the comprehensiveness of the information would be adversely affected by the disclosure of committee papers, particularly when only a short period of time has elapsed since the meeting, and when the policy in question continues to be kept under review.
 - In addition, disclosure could undermine the principle of collective responsibility for decisions by revealing interdepartmental considerations.
4. The Cabinet Office also informed the complainant that “a large amount of Government research relevant to this area is already available publicly, for example ‘The Impact of Free Movement of Workers from Central and Eastern Europe on the UK Labour Market: Early Evidence’ (May 2005), which is available at <http://www.dwp.gov.uk/asd/asd5/wp2005.asp>”.
5. On the same day, 31 May 2006, the complainant contacted the Cabinet Office to request an internal review of its decision.
6. On 10 July 2006, the Cabinet Office informed the complainant that the outcome of the internal review upheld its decision to withhold the information under sections 35(1)(a) and 35(1)(b) of the Act. It did not provide any additional reasons for this decision.

The Investigation

Scope of the case

7. On 13 July 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - i. The Government has introduced the Accession States Worker Registration Scheme, then increased the cost of registering for workers by 40% and then extended the scheme without once consulting interested parties,

producing a regulatory impact assessment or even attempting to justify its decisions in anything more than a few sentences (some of which have proved incorrect).

- ii. It is impossible to make representations sensibly unless one knows what the purpose of the government policy is.
 - iii. The Cabinet Office failed to provide a reasonable explanation for its decision.
8. Having assessed the documents provided to him by the complainant, the Commissioner proceeded to investigate whether the withheld information engages section 35 of the Act and, if so, whether the balance of the public interest favours the maintenance of this exemption.

Chronology

9. On 18 September 2007, the Commissioner contacted the Cabinet Office to request the following:
- i. A copy of the information withheld from the complainant; and
 - ii. Any further representation the Cabinet Office wishes to make about its handling of the request.
10. The Cabinet Office responded to the Commissioner on 18 October 2007. It invited the Commissioner to view the withheld information on Cabinet Office premises “given that the papers for Ministerial Working Groups are subject to tight distribution controls and are sensitive in nature”. The Cabinet Office also provided the Commissioner (in confidence) with comments on the justification behind its decision, which related to the specific issues discussed within the withheld document.
11. However, the Commissioner considers the following representations made by the Cabinet Office to be suitable for inclusion in this Notice (and are reproduced here as direct quotations):
- In producing papers for a Ministerial Working Group such as this, we believe that it is vital that officials have the space to consider and present all the possible options for Ministers to discuss. They must be able to give frank advice, and a comprehensive assessment of the risks associated with each option.
 - The information contained in the paper was sensitive at the time of the request, and that remains the case.
 - Whilst the Ministerial Working Group was itself an ad hoc body, rather than a formal sub-Committee of the Cabinet, its function was to develop and discuss policy options in order to make recommendation to the Asylum and Migration Cabinet Committee, which the Prime Minister chaired. We therefore believe

that its proceedings fall within the scope of the exemption under section 35(1)(b).

- Revealing the policy options presented to Ministers for collective discussion and decision-making would undermine the process of collective government and inhibit Ministers' from having a frank and fully-informed discussion in order to reach informed decisions. It might also, whether directly or by inference, reveal disagreements between Ministers and departments, thereby undermining the convention that once decisions have been reached, ministers are bound by collective responsibility.
 - The Government has published a large amount of information about migration from the accession states, in order to inform the public debate and to set out the evidence it collects, including the Annual Monitoring Reports produced by the Home Office and Department for Work and Pensions.
12. On 26 February 2008, the Commissioner visited the Cabinet Office to view the information withheld from the complainant. It consisted of one document, 21 pages long and dated 21 September 2005, entitled: "Cabinet Ministerial Working Group on Asylum and Immigration: Free Movement of Workers from new EU Member States". The Commissioner is satisfied that no other information is held by the Cabinet Office which falls within the scope of the complainant's request.

Findings of fact

13. The Worker Registration Scheme (WRS) was set up in 2004 to allow workers from the "A8 Countries" to work in the UK. The A8 countries were the countries that joined the European Union in 2004, excluding Malta and Cyprus. Workers from these countries must register on the WRS scheme within a month of joining a new employer in the UK. By registering, they are able to claim some basic benefits, such as Housing Benefit, Council Tax Benefit and Tax Credits. However, the worker must be employed to be able to claim these benefits. If the worker is able to prove that they have worked legally for at least a 12 month period (without a break in employment of more than 30 days) then they gain the ability to claim social security benefits such as Jobseeker's Allowance. However, there are certain types of workers from the A8 countries that are exempt from having to register on the scheme in order to work in the UK.
14. The paper withheld from the complainant invited Ministers to consider whether to continue with the WRS for a further three years from the end of April 2006 or close it down at that date and provide migrants from the A8 countries with the same employment and social rights as those from pre-existing EU countries. The Government subsequently agreed to continue with the scheme until 2009 and conduct a review of it at that time to determine whether, in accordance with EU rules, it should continue until 2011.
15. Cabinet collective responsibility is a constitutional convention at Westminster that members of the Cabinet must publicly support all government decisions made in Cabinet, even if they do not privately agree with them. This support includes

voting for the government in Parliament. This doctrine also applies to all members of the government.

Analysis

Exemption

Section 35(1)(a) – Formulation or development of government policy

Section 35(1)(b) – Ministerial communications

16. Section 35 is a class based exemption which means that, in this case, so long as the information 'relates' to the formulation of government policy or ministerial communications, the exemption is engaged. The Commissioner is satisfied that the information withheld from the complainant engages the exemption under section 35 of the Act and, in particular, subsections (1)(a) and (b). The Commissioner considers this to be the case for the following reasons:
- i. The paper was prepared for a ministerial working group and was therefore intended as a communication to ministers.
 - ii. The paper was produced to provide background and analysis to that ministerial working group, in order for it to consider options and provide a recommendation to the Asylum and Migration Cabinet Committee. The paper was therefore used as part of the policy formulation process.
17. However, in order for the section 35 exemption to be maintained, in all the circumstances of the case, the public interest in maintaining the exemption must outweigh that in the disclosure of the information. The Commissioner therefore proceeded to analyse the public interest in respect of the information withheld from the complainant.
18. In conducting his analysis of the public interest, the Commissioner took into account the principles set out by the Information Tribunal in *DfES v the Commissioner and the Evening Standard* (EA/2006/0006, paragraph 75) which it stated should guide the weighing of the public interest in cases where section 35(1)(a) has been applied. They are:
1. The information itself
 2. 'Status' of information not relevant
 3. Protection for Civil Servants not Politicians
 4. Timing
 5. When is policy formulation or development complete?
 6. Information in the public domain
 7. The robustness of officials
 8. Junior officials
 9. Relationship between Officials and Politicians
 10. How will the public use the information?
 11. Names of civil servants

19. In taking the Information Tribunal's analysis into account, and applying it to his observations about the information withheld from the complainant, the Commissioner considered the following public interest factors to be of relevance in this case:

In favour of disclosure

- i. Promoting public understanding behind decisions taken.
- ii. Public participation and debate in policy issues, especially where the subject matter is of a controversial nature.
- iii. Accountability for decisions taken.
- iv. Transparency in decision making.
- v. Information contained within the paper which is already in the public domain.

Against disclosure

- i. The short period of time elapsed between the meeting and the complainant's request, and that the policy in question continues to be kept under review.
 - ii. Effects on the principle of collective responsibility for decisions by revealing interdepartmental considerations which may reveal disagreements between Ministers and departments.
 - iii. Revealing the policy options presented to Ministers for collective discussion and decision-making could undermine the process of collective government and inhibit Ministers' from having a frank and fully-informed discussion in order to reach informed decisions.
 - iv. Effects on the comprehensiveness of information provided for consideration in policy making.
20. The Commissioner believes that each of the factors considered in favour of disclosure of the information carry significant weight. However, he was less persuaded of the arguments against disclosure as they apply to this information. In particular, he does not accept that the disclosure of this information would undermine collective cabinet responsibility and does not accept that the existence information already in the public domain on this matter is a factor to be given weight in favour of maintaining the exemption in this case. The Commissioner does accept that the remaining factors against disclosure are persuasive to some extent. However, although he attached weight to these, the Commissioner does not believe that they outweigh the significant factors in favour of disclosure (when taken together). In this case, the Commissioner therefore considers that the balance of the public interest under section 35(1)(a) favours the disclosure of the information.
21. The Commissioner reached his decision in respect of the public interest test as a result of the following specific conclusions and considerations he derived, which relate to an overview of the content and context of the information:
- i. Much of the evidence contained within the paper in relation to the labour market can be found in the public domain, most notably in the document: 'The Impact of Free Movement of Workers from Central and Eastern

Europe on the UK Labour Market: Early Evidence' (May 2005). It can be reasonably assumed that this information was included in this paper and taken into consideration by Ministers in reaching a decision on the matter.

- ii. The Government's decision on this matter is considered to be controversial for a variety of reasons, such as with regard to the rules put in place regarding the hiring of labour from the A8; decisions in relation to access to benefits and social services; impacts on immigration and the UK labour market; and the decision not to follow that of many of the pre-existing EU members who chose to delay the opening of their labour markets to citizens of the A8 beyond 2004. The Commissioner believes that this controversy stems, in part, from a lack of public engagement in the process by which the decision was reached. He therefore considers that there is a public interest in addressing controversies surrounding the decision, to which the disclosure of this information would assist.
- iii. More generally, the factors which accounted for the reasons behind the Government's decision are not widely known or understood. The Commissioner believes there is a significant public interest in the public seeing the whole picture of the decision making process and he has concluded that disclosure of this information would serve the public interest in this respect. This is because it would enable the public to fully understand the reasoning behind the decision taken (in terms of the factors, evidence and analysis taken into account) and enable it to be debated and challenged in a more informed manner.
- iv. The Commissioner does not consider that release of this information would adversely affect the ongoing review of the policy. This is because he does not see how ongoing consideration of each the factors considered in the paper would be undermined if they were placed in the public domain. In addition, the Commissioner believes that the contribution to public debate from which disclosure of the information would result is likely to assist in this review. This is because, in this case, disclosure would enable greater and wider input into the policy making process and assist the Government in making a more informed decision, such as with regard to the impact on the UK of the policy to date.
- v. The nature of the considerations within the paper would not harm collective cabinet responsibility as it is difficult to see how the opinions of individual Ministers taking part in the decisions in question could be inferred from this information.
- vi. The Commissioner does not consider that the candour of civil servants would be adversely affected by the disclosure of the withheld paper. He believes this to be the case for three reasons. First, in respect of the factors considered in the paper, the Commissioner considers the nature of the analysis to be objective, balanced and reasoned. Secondly, the Commissioner notes that the withheld information does not contain the names of any of the civil servants who produced it and does not attribute any of its contents to individual officials. Finally, the Commissioner

considers the case of the Information Tribunal In *DfES v the Commissioner and the Evening Standard (EA/2006/0006)* to be of relevance. That case also related to the application of section 35 in respect of the candour of officials. The DfES had argued that the threat of civil servants' advice being disclosed would cause them to be less candid when offering such opinions. However, the Tribunal stated that "...we are entitled to expect of [civil servants] the courage and independence that ... [is]...the hallmark of our civil service". It went on to describe civil servants as "...highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions." In short, it was judged that they should not easily be discouraged from doing their job properly. However, in the circumstances of this case, this factor was not given significant weight. This is also in light of the Commissioner's comments on the timing of the request below.

- vii. The timing of the request is an important factor in this case as the request was made after the decision related to the Accession States Worker Registration Scheme was announced. Therefore, the Commissioner believes that the need to protect the space to formulate and develop policy had reduced. That is not say that the public interest in protecting the space had completely diminished as the Commissioner acknowledges further policy development might have followed the decision. However, the Commissioner has accorded less weight to this consideration because the decision had been made. The Commissioner notes that in the DfES decision referred to above the Tribunal noted that the timing of a request was of paramount importance to a decision:

We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy. We note that many of the most emphatic pronouncements on the need for confidentiality to which we were referred, are predicated on the risk of premature publicity. In this case it was a highly relevant factor in June 2003 but of little, if any, weight in January 2005.

In the High Court decision *Office of Government Commerce v the Information Commissioner* [2008] EWCH 737 (Admin) Burnton J approved the approach taken in DfES:

I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling

measure, and as a result I see no error of law in the finding that the importance of preserving the safe place had diminished.

22. In summary, the Commissioner considers that many of the public interest arguments against disclosure carry some weight but, in all the circumstances of the case, they do not outweigh the substantially significant public interest arguments in favour of disclosure of the information. The Commissioner believes that the public interest in accountability, transparency and public understanding would be significantly furthered by the disclosure of the information, especially with regard to factors which go beyond considerations regarding the UK's labour market. The Commissioner therefore concluded that the withheld information should be disclosed to the complainant in its entirety.

The Decision

23. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act. This is because the misapplication of the exemption under section 35 of the Act led to a breach of section 1(1)(b).

Steps Required

24. The Commissioner requires the public authority to disclose the information withheld to the complainant, namely the paper entitled: "Cabinet Ministerial Working Group on Asylum and Immigration: Free Movement of Workers from new EU Member States".
25. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

26. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

27. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 5th day of August 2008

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

“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.”

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

Section 35(5) provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."