

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2014

Public Authority: Department for Communities and Local Government

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant has requested from the Department for Communities and Local Government (DCLG) information relating to the estimate for the number of Romanians and Bulgarians expected to arrive in the UK following the lifting of labour market controls. DCLG confirmed that the government had decided not to make estimates of the numbers of Romanians and Bulgarians expected to migrate but did point the complainant to literature that was already in the public domain in this area. The DCLG also identified information it held consisting of Cabinet Committee papers and emails that related to the government's broader domestic planning for the lifting of labour market restrictions. However, it claimed that this information was exempt from disclosure under sections 35(1)(a) and (b) (government policy) of FOIA or, in the alternative, sections 36(2)(a)(i) and 36(2)(b)(i) and (ii) (prejudice to the effective conduct of public affairs) of FOIA.
 2. The Commissioner has been asked to consider the DCLG's decision to withhold information under these exemptions and has found that sections 35(1)(a) and (b) are engaged and that, in all the circumstances, the public interest favours maintaining the exemptions. The Commissioner does not therefore require any steps to be taken by the DCLG as a result of this notice.
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Request and response

3. On 15 January 2013 the complainant requested information in the following terms:
 1. *Please provide a copy of the figures that have been presented to Ministers as an estimate for the number of Romanians and Bulgarians who could come to the UK in 2014 when labour market controls are lifted at the end of the year.*
 2. *Please provide all information relating to the methodology being used to estimate the number of Romanians and Bulgarians anticipated will come to the UK in 2014 when labour market controls are lifted at the end of the year.*
4. The DCLG contacted the complainant on 13 February 2013 and informed the complainant that it considered the exemption provided by section 36 was engaged in respect of the requests. The DCLG explained that FOIA required a public authority to respond to a request within 20 working days but permits an extension where a qualified exemption is engaged and the public authority requires additional time to consider the balance of the public interest. Owing to the complex public interest considerations attached to the case, the DCLG stated that it needed additional time beyond the 20 working days in which to respond and planned instead to let the complainant have a response by 13 March 2013. The DCLG subsequently informed the complainant on 12 March 2013 that the date set for a response had been pushed back to 12 April 2013.
5. The DCLG's substantive response to the requests was provided on 5 April 2013. It confirmed that government ministers had decided not to make estimates of the numbers of Romanian or Bulgarian nationals that were expected to migrate to the UK. The DCLG did though clarify that it held other information relevant to the requests.
6. Of this information, some had already been published and so it was considered by the DCLG to be exempt information under section 21 (information accessible by other means) of FOIA. This included the technical report "Identifying social and economic push and pull factors for migration to the UK by Bulgarian and Romanian nationals"¹, which had been on the DCLG's website since October 2011. The DCLG also

¹<http://webarchive.nationalarchives.gov.uk/20120104120950/http://www.communities.gov.uk/archived/general-content/corporate/researcharchive/volume8immigration/>

verified that it held a report commissioned by the Foreign and Commonwealth Office (FCO) from the National Institute of Economic and Social Research (NIESR) on the possible impact of the ending of transitional controls on Romanian and Bulgarian nationals². This had been published earlier that day.

7. The DCLG further identified information falling within the scope of the request that comprised Cabinet Committee papers and emails between officials and ministerial offices. However, it claimed that this information was exempt information under sections 35(1)(a) and 35(1)(b) or, in the alternative, sections 36(2)(a)(i), 36(2)(b)(i) and 36(2)(b)(ii) of FOIA.
8. The complainant wrote to the DCLG on 8 April 2013 and challenged the decision to withhold requested information; arguing that the DCLG had failed to give sufficient weight to the case for disclosure. The DCLG therefore carried out an internal review, the outcome of which was provided to the complainant on 7 May 2013. This upheld the DCLG's original position.

Scope of the case

9. The complainant contacted the Commissioner on 8 May 2013 to complain about the way her requests had been handled. In particular, she has in effect asked the Commissioner to consider whether the DCLG properly applied FOIA by refusing to disclose the information to which sections 35 and 36 had been applied.
10. This issue therefore forms the focus of this notice and the Commissioner has not returned to any other aspect of the DCLG's handling of the information requests.

Reasons for decision

Background

11. Romania and Bulgaria (referred to as A2 countries) joined the EU in 2007, three years after the A8 nations (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia). Their entry
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² <https://www.gov.uk/government/publications/potential-impacts-on-the-uk-of-future-migration-from-bulgaria-and-romania>

was initially subject to some restrictions or conditions in respect of access to labour markets, unlike Malta and Cyprus which also joined the EU in the 2004 wave of expansion.

12. The UK decided not to impose substantive employment conditions in response to the accession of the A8 countries. However, this approach changed with the A2 nations, where the UK government exercised its right to impose transitional restrictions until 2011 and thereby adopt a more gradual approach to labour market access for workers from these member states. Towards the end of 2011, the government announced that the restrictions would continue until the end of 2013.
13. The period leading up to the lifting of the restrictions – at the beginning of 2014 – has attracted significant attention because of concerns about the number of A2 nationals that would migrate to the UK and the potential strain on resources that this would cause, not least on public services.

Scope of the withheld information

14. In its submissions to the Commissioner the DCLG has advised that it has adopted a liberal interpretation of the request, not least to ensure some consistency with a number of similar requests that were received around the same time. This has led the DCLG to identify information as within scope that may have been considered otherwise if a narrower reading of the request had been acted on.
15. From his inspection of the information, the Commissioner considers that there is a question over whether all of the withheld information should be dealt with as part of the request. However, he has ultimately decided that the information flows from, or is broadly related to, issues concerning the methodology used to estimate the number of EU A2 (Bulgarian and Romanian) immigrants. Consequently, he has considered all of the information as part of this notice.
16. The DCLG has claimed in this case that all of the disputed information is exempt information under section 35 of FOIA. However, in the event that this was found not to be engaged, it has argued that the application of the exemption provided by section 36 to the same information should be considered.
17. The Commissioner acknowledges that the two exemptions protect many of the same interests. Significantly, however, sections 35 and 36 are mutually exclusive, which means that section 36 cannot apply to requested information insofar as any part of section 35 is also engaged.

Section 35 – government policy

18. The DCLG's primary argument is that the entirety of the disputed information would fall within the section 35(1)(b) exemption. However, it also considers that section 35(1)(a) of FOIA would apply.
19. Section 35(1) of FOIA states that information held by a government department or by the National Assembly of Wales is exempt information if it relates to –
 - (a) the formulation or development of government policy
 - (b) Ministerial communications
20. Section 35 is a class based exemption. This means that if the requested information relates to the activities that the exemption describes it will necessarily be engaged; there is no requirement for disclosure to have a prejudicial effect on these activities. As it is also a qualified exemption, however, section 35 of FOIA is subject to the public interest test.
21. The starting point for the Commissioner has been to consider whether section 35(1)(b) of FOIA is engaged in respect to some or all of the disputed information.
22. At paragraph 96 of his guidance on section 35 of FOIA³, the Commissioner reflects that the *purpose of section 35(1)(b) is to protect the operation of government at ministerial level. It prevents disclosures which would significantly undermine ministerial unity and effectiveness or result in less robust, well-considered or effective ministerial debates and decisions.*
23. FOIA provides a definition of ministerial communications at section 35(5), which reinforces the notion that the exemption refers to communications *between* ministers. As the Commissioner's guidance makes clear at paragraph 99 this means it will not include a communication from a minister to a non-minister. However, the guidance continues by saying that communications do not have to be

³http://www.ico.org.uk/for_organisations/guidance_index/~//media/documents/library/Freedom_of_Information/Detailed_specialist_guides/government-policy-foi-section-35-guidance.ashx

exclusively between ministers: the exemption will cover communications between two (or more) ministers even if others are copied in.

24. Section 35(5) of FOIA specifies that "Ministerial communications" includes proceedings of the Cabinet or of any committee of the Cabinet. Consequently, there is no doubt that the section 35(1)(b) exemption as clarified by section 35(5) would be engaged in respect of the Cabinet Committee papers. The Commissioner has therefore gone on to consider whether a similar finding should be reached for the remaining withheld information, namely the emails between officials and ministerial offices.
25. Upon an initial reading of the emails, it is not immediately clear that the information could reasonably be classified as ministerial communications. Nevertheless, the DCLG has argued, and the Commissioner accepts, that the term *relates to* in the exemption must be given a broad interpretation. This corresponds with the view of the Information Tribunal in *The Department for Education and Skills v Information Commissioner The Evening Standard* (EA/2006/0005, 19 February 2007)⁴; albeit that decision focused on the term in the context of section 35(1)(a) of FOIA. The Tribunal commented that *relates to* in section 35 can safely be given a broad interpretation because it is a qualified exemption, which means that even where the exemption is found to be engaged the public interest test should ensure a common sense approach to the disclosure of information can be adopted.
26. Allowing for this broad interpretation, the DCLG has claimed that the emails would fall within scope of section 35(1)(b) because they relate either directly, or otherwise sufficiently, to the proceedings of the Cabinet Committee, specifically the Home Affairs Committee (HAC).
27. The Commissioner accepts that the emails flow from the issues considered by the HAC. Yet, this is not the same as saying that the information itself constitutes ministerial communications and the Commissioner does not agree that the fact the emails are connected, and on occasion make reference, to the HAC brings the information within the scope of the exemption. The Commissioner is, however,

⁴ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i70/DFES.pdf>

satisfied that the information would instead be covered by the exemption provided by section 35(1)(a) of FOIA.

28. What is meant by “the formulation or development of government policy” stated in section 35(1)(a) is not expanded on in the legislation and it is common ground that providing a definition of policy is in itself problematic. In his decision on FS50083726⁵, involving the Foreign and Commonwealth Office, the Commissioner considered that the formulation and development policy could be described as follows:

60. The Commissioner takes the view that the ‘formulation’ of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister. ‘Development’ may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least ‘formulation or development’ suggests something dynamic, i.e. something that is actually happening to policy [...]”

29. In the Commissioner’s view, a distinction can be made between information relating to the formulation and development of policy, which would be captured by the exemption, and information concerning the implementation of policy, which would not.

30. In response to the Commissioner’s query regarding the circumstances in which the disputed information was produced and communicated, the DCLG has explained that the context is that of the government, by collective ministerial decision and direction through the HAC, seeking to establish an overarching policy response and constituent policies at departmental level on the possible effects of Bulgarian and Romanian

⁵ http://ico.org.uk/~media/documents/decisionnotices/2009/FS_50083726.ashx

migration. The DCLG considers that in this sense the information relates to the policy process of assessment and briefing in order to understand implications, options and plans and was in the *formulation* stage.

However, it also recognised that in part the information may have been arrived at through the *development* of existing policies. In either event, the DCLG has argued that section 35(1)(a) would be engaged.

31. The Commissioner is satisfied that the information relates to ongoing work to reach a settled policy on the issue of migration from Romania and Bulgaria. As previously mentioned, the withheld emails feed into the process of discussions originating in the HAC and as such have a direct relationship with the formulation and development of government policy. Although the distinction between formulation and development is not necessarily clear in this case, the fact remains that the emails would be subject to section 35(1)(a) of FOIA.
32. As the Commissioner has found that sections 35(1)(a) and (b) are engaged, he has gone on to consider the balance of the public interest in disclosure. In some cases, it will be appropriate to consider separately each of the exemptions on the basis that the information to which they relate attracts different considerations. However, the Commissioner has felt it appropriate in the circumstances to consider the withheld information as a whole in the context of the public interest test. This is because the same public interest arguments are present.

Public interest arguments in favour of disclosure

33. In her submissions to the Commissioner, the complainant has argued that when considering the strength of the public interest arguments it is necessary to consider the potential impact that immigration from the A2 countries could have on UK housing, health, benefits and other public services and the contribution the information will make to public debate. The significance of these issues to the public and the importance of transparency resulting from this would, in the view of the complainant, inevitably sway the public interest in favour of disclosure.
34. The Commissioner has also previously recognised the “acute public interest” in information relating to the government’s approach to the A2 countries’ entry into the EU. This was expressed in his decision notice issued under FS50397684⁶, which concerned a request made to the Cabinet Office in May 2010 for “information regarding the imposition of

⁶ http://ico.org.uk/~media/documents/decisionnotices/2011/fs_50397684.ashx

employment restrictions on Romania and Bulgaria when they joined the European Union on 1.1.2007”.

35. The Cabinet Office had refused the request under section 35(1)(b) of FOIA and ultimately the Commissioner and the Information Tribunal upheld the application (*Razan Veer v The Information Commissioner & The Cabinet Office*, EA/2011/0255; 26 September 2011)⁷.

Public interest arguments in favour of maintaining the exemption

36. To support its position that the balance of the public interest favours maintaining the exemption, the DCLG has pointed the Commissioner to the fact that at the time of the request the policy considerations on A2 immigration were still 'live' and the policy itself remained highly sensitive and contentious. This therefore underlined the need for ministers to have safe space in which to debate policy issues away from external interference; an importance that the DCLG considers was borne out by the Information Tribunal in its consideration of the appeal arising from the Commissioner's decision on FS50397684.
37. The DCLG acknowledged that much of the Tribunal's reasoning focused on arguments relating to collective Cabinet responsibility; a factor that will only assume relevance where information reveals the views of an individual minister on a government position. In respect of the Cabinet Committee papers considered as part of this case, the DCLG considers that the same considerations would apply in this situation because it would be possible to attribute comments about particular areas of policy to particular ministers. However, the DCLG considered that the Tribunal's findings also attested to the wider importance of the principle that ensures there is safe space for minister decision-making:

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 [...] (paragraph 22)

v) The issue of employment restrictions is ongoing. It was "live" at the time of the request in 2010 and remains current as the

⁷ http://www.informationtribunal.gov.uk/DBFiles/Decision/i809/UKFTT_GRC_EA-2011-0255_2012-05-21.pdf

restrictions have been extended until the end of 2013 [...] 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."

38. Transferring this principle to the present case, the DCLG argues that effective decision-making will only be possible where ministers are not distracted from the task of considering all the available options.
39. The DCLG has also claimed that the public interest in disclosure is lessened to an important extent because of the amount of information relevant to the complainant's request that is publicly available. Although the particular details of the cases differ, it can be noted that the Information Tribunal in *Veer* (EA/2011/0255) similarly accepted that the case for disclosure may lose some of its strength where there is already literature available that explains the rationale for the government's approach (paragraph 22, point vi).

Balance of the public interest

40. It is clear that the issues relating to the lifting of employment restrictions on A2 nationals was the focus of significant public attention and debate at the time of the request. This supports the need for transparency in the government's policy making and strengthens the corresponding public interest in disclosure of the requested information. The Commissioner has particularly focused on two factors – the timing of the request and the content of the withheld information itself.
41. In respect of timing, the Commissioner has observed that the request was submitted only a short period after the date of the HAC meeting and the production of the papers and emails in question. As previously noted, it is accepted that aspects of the wider policy on the A2 immigration to which the information relates was not settled at that time and was still subject to detailed consideration. To the Commissioner's mind, this would reinforce the expectation of confidentiality regarding the content of the policy and ministerial discussions and substantiate the DCLG's safe space arguments. The timing also lends additional weight to the importance of protecting the collective responsibility principle in respect of the HAC proceedings.
42. The Commissioner is satisfied that the withheld information would not add anything especially meaningful to the public debate on the issue and does not strengthen the case for disclosure in terms of the insight it provides. In forming this view the Commissioner has also considered the information already in the public domain. There is still a public interest in the "full picture" of what has been considered as part of the policy process, regardless of the content, but this is not given any added weight by the specific content.

43. Ultimately, the Commissioner has found that a distinction can and should be drawn between the strong public interest connected to the wider impact of EU expansion and the government's response, particularly following the lifting of labour restrictions on new member states, and the public interest linked to the information in this case. In his view, the principle of allowing the government space in which to debate strategic policy issues is undoubtedly an important one. The weight in maintaining both sections 35(1)(a) and (b) is therefore strong. Against this, the Commissioner considers that the relatively limited value the information would hold in informing and encouraging public debate means that the case for disclosure suffers in comparison.
44. The Commissioner has therefore concluded that in all the circumstances the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption under sections 35(1)(a) and (b). On this basis, the Commissioner has not been required to consider the DCLG's application of section 36 of FOIA.

Right of appeal

45. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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