



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

**Case No. EA/2010/ 0027**

**ON APPEAL FROM:**

**The Information Commissioner's**  
**Decision Notice No: FER 501322939** ]  
**Dated: 8<sup>th</sup>. December, 2009**

**Appellant:** The Cabinet Office  
**Respondent:** Information Commissioner  
**Heard at:** Field House, Bream Buildings  
**Dates of hearing:** 28<sup>th</sup>.July, and 2<sup>nd</sup>.September, 2010 ]  
**Date of decision:** 4<sup>th</sup>.October, 2010

Before  
D.J. Farrer Q.C.  
Judge  
and  
Henry Fitzhugh  
and  
Richard Fox

**Attendances:**

For the Appellant : Rory Dunlop

For the Respondent : Timothy Pitt - Payne Q.C.

**Subject matter:** Right to rely before the Tribunal on exemptions not specified in the Notice of Refusal nor considered in the Information Commissioner's Decision Notice. Sections 2(2), 17 and 58 of FOIA.

Application of section 40 of FOIA to names of civil servants by and to whom submissions to ministers are sent.

Ministerial ("internal" ) communications): EIR r.12(4) (e) and the convention of collective responsibility

Advice from civil servants ("internal" communications): EIR r.12(4) (e)

**Cases:**

*DFES v IC EA/2006/0006,*  
*Home Office & Ministry of Justice v IC [2009] EWHC*  
*1611 Admin*

*DEFRA v IC( Birkett) (EA/2009/0106)*  
*Home Office v IC (EA/2010/0011*

*The Cabinet Office v Information Commissioner (Lamb)*  
*EA/2008/0024 ;*

*The Cabinet Office v Information Commissioner*  
*EA/2010/0031*

## **DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal allows the appeal to the extent indicated and substitutes the following Decision Notice in place of the Decision Notice dated 8<sup>th</sup>. December, 2009

### **SUBSTITUTED DECISION NOTICE**

**Dated** 21<sup>st</sup>. September, 2010

**Public authority:** The Cabinet Office

**Address of Public authority:** 70 Whitehall, London SW1A 2AS

**Name of Complainant:** Mr. Phil Michaels, Friends of the Earth

### **The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following Decision Notice in place of the Decision Notice dated 8<sup>th</sup>. December, 2010.

### **Action Required:**

Within 35 days of publication of this Decision, the Appellant shall disclose to the Requester the following documents, subject to the omissions specified and to the exclusion of any manuscript comment on the face of the document:

<b>Document No. (Closed bundle numbering)</b>	<b>Brief Description</b>	<b>Omissions/Redactions</b>
1	Cabinet Secretariat Memorandum dated 16/5/06	The name of the author at the beginning and end of the memorandum. The second paragraph on page 1 . All of Page 2 Page 3 except for the words “the Prime Minister” followed by the four bullet points and Except for the final paragraph. The last seven names on the Attendance list on page 4
3	Briefing Note for Energy Review Meeting of 15/05/06	The four paragraphs headed “Issues” on pages 24 and 25. From paragraph 6 on page 3 the word “from” and the names that follow. The name in paragraph 9 on page 3
4	Briefing Note to Prime Minister for Energy Review Meeting of 15/05/06	The whole document
5	Briefing Note from Energy Review Team	The whole document
6	Briefing Note to Prime Minister for meeting of 9/05/06	The whole document
7	Two e mails	All names on page 71
15(a)	Minute to the Prime Minister	The second paragraph
15(c)	Attachment	
16	Powerpoint Presentation	The whole document
17	Minute and manuscript comment	The whole document

Dated this 4<sup>th</sup> day of October, 2010

Signed D.J. Farrer Q.C.

Judge

## DECISION

### Introduction

- 1 The Government published an Energy White Paper in February, 2003. It left open the option to build new nuclear power stations in pursuit of a low carbon economy but promised the “*fullest possible consultation*” on any further Government proposals before any new nuclear build.
- 2 In November, 2005, a full review of future energy policy was announced, to include issues of nuclear power. Extensive public consultation was promised. The consultation process began on 23<sup>rd</sup>. January, 2006 and continued until 14<sup>th</sup>. April, 2006. The Review resulted in the publication of a report on 11<sup>th</sup>. July, 2006, which concluded that nuclear power stations should, in principle, be built and made proposals as to how such a policy might be implemented.
- 3 On 16<sup>th</sup>. May, 2006, whilst the review was current, the Prime Minister, Mr. Tony Blair, in a speech to the Confederation of British Industry (“CBI”), made an important statement as to U.K. energy policy. He indicated that he had seen “*the first cut of the review*” and added :

*“These facts put the replacement of nuclear power stations...back on the agenda with a vengeance. If we don’t take these long term decisions now, we will be committing a serious dereliction of our duty to the future of this country”.*

A reasonable interpretation was that the Government had already reached a concluded view on the future role of nuclear power, although public consultation was still proceeding.

4 The Request

The Friends of the Earth (“FOE”) made the following request for information to the Prime Minister two days later :

*‘1. A full copy of the “first cut of the review” as referred to in your speech to the CBI.*

*2. A full copy of any or any other briefing received by your office prior to the CBI conference in connection with progress on the Energy Review.*

*3. Full details of the meeting on 16 February with the Energy Review Team including, in particular:*

*(a) the names and positions of those present at the meeting;*

*(b) whether there exists any agenda for, or record of, the meeting (whether formal minutes or otherwise);*

*(c) a copy of any such agenda and record’*

5 The Cabinet Office, as the relevant public authority, by letter of 23<sup>rd</sup>. June, 2006, confirmed that it held the requested information but refused to disclose it, stating that some was already publicly available and relying, as to the rest, on Regulation 12(4)(e) of the Environmental Information Regulations 2004 (“EIR”), alternatively on s. 35(1)(a) and (b) of FOIA, if that was the governing legislation. A review confirmed this refusal.

6 In February, 2007, the High Court ruled that the decisions in the July report were unlawful because there had not been the promised consultation. The result was a fresh White Paper and a

further consultation designed to meet the Court's requirements.  
That continued until November, 2007.

- 7 FOE submitted a second and similar request on 20<sup>th</sup>, September, 2007. It met with a refusal on 18<sup>th</sup>. October, 2007, on the same grounds as before and later confirmation of that refusal on review.
- 8 In January, 2008, the Government published a "new policy" as to the building of nuclear power stations, suggesting that the earlier review, including the lawful consultation, had resulted in significant change.
- 9 The Decision Notice

The Decision Notice was not issued until 8<sup>th</sup>. December, 2009. The Information Commissioner ("the IC") ruled :

- (i) That the relevant request was the later, made in September, 2007, so that the decision must be reached by reference to the circumstances prevailing in September, 2007.
- (ii) That the requested information was environmental information as defined in regulation 2(1)(c) of EIR, because it related to energy policy.
- (iii) Regulation 12(4) (e) of EIR was engaged as to all the requested information . since it constituted "internal communications".
- (iv) As to the balance of the public interest,

- (a) Certain of the information, identified in the closed schedule, was properly withheld, though the Cabinet Office should have provided a list of withheld documents to FOE.
  - (b) The remaining documents (information) should be disclosed save the names of officials of Grade 5 or below. A schedule of such documents was supplied. As to all this information, the public interest in disclosure, fortified by the statutory assumption, required disclosure.
- 10 Before the hearing of this appeal, the IC acknowledged that the name of any official of grade 5 or below should be withheld and the Substituted Decision reflects that agreement.
- 11 By its Grounds of Appeal and subsequent written submissions the Cabinet Office raised the following issues:
- (i) Whether certain documents lay outside the scope of the Request.
  - (ii) Whether the information of which the IC ordered disclosure was “environmental information”.
  - (iii) Whether the public interest in disclosure of such information was greater than the interest in maintaining the exception or exemption.
  - (iv) Whether the IC had power to order a list of withheld documents or should have so ordered.
  - (v) Whether some of the withheld information was exempt from disclosure by virtue of EIR 12(5)(a) or, as the case may be, FOIA s.27 (Damage to international relations).



(vi) Whether some was exempt by virtue of the exception in EIR 12(5)(e)(commercial confidentiality).

(vii) Whether the Cabinet Office could or should be allowed to rely on (v) and (vi), given that it did not raise such exemptions/ exceptions before publication of the Decision Notice.

12 The IC argued his case on these submissions in his Reply. Both parties made written submissions before the hearing, which were revised and elaborated in written closing submissions after the hearing of evidence. We reconvened to consider our Decision in the light of those final submissions and, by agreement, did not entertain further oral argument. In so far as the parties' submissions diverged, the differences are briefly summarised below.

13 The evidence

We heard evidence from Sir Paul Britton Kt. CB, Director General and Head of the Economic and Domestic Affairs Secretariat of the Cabinet Office from 2001 to 2009, following previous experience as a senior civil servant in the Department of the Environment and the Cabinet Office spanning many years. He is plainly a highly authoritative witness on the issues with which he dealt.

14 Sir Paul focused on three issues :

- (i) The scope of the Request.
- (ii) The importance of the doctrine of collective responsibility.

(iii) The need for a “safe space” for policymaking and the risk that frank advice will not be tendered or recorded, if the adviser, whether civil servant or special adviser, believes that his advice and his identity as adviser will be prematurely revealed to the public.

15 He referred us to the long history of confidentiality attaching to briefings and to ministerial communications. He reminded us of the provisions of the Civil Service Code (2006) and the Special Adviser Code of Conduct (2007) as to the obligation to observe confidentiality as to official information. He emphasised the particular need for a safe space in relation to decisions involving the Prime Minister.

16 These are by now familiar arguments for this Tribunal. To say that is not in any sense to belittle their importance as factors which always support, usually to a substantial degree, the case for withholding information to which they are relevant. Their familiarity may, however, explain why, taking proper cognizance of them, we do not set out in great detail the ancillary arguments which have been rehearsed elsewhere in decisions of the Tribunal.

17 We read and heard further evidence from Mr. William Rickett, now retired but formerly Director General responsible for the development of UK energy policy at the Department of Trade and Industry and its successors. He gave helpful evidence as to the course of policy in the early years of this century and the various White Papers and Reviews that appeared. He further addressed the question of the public interest in disclosure of particular documents covered by this request. In the Autumn of 2007, he told us, policy

on new nuclear power was in the process of formulation and there was great concern as to what the Department said about energy policy generally.

18 The reasons for our Decision

(i) Scope

It was accepted by the IC on appeal, clearly rightly, that manuscript comments on the documents under consideration were outside the ambit of the Request.

The wording of paragraph 2 of the Request, “*or any other briefing received by your office prior to the CBI conference in connection with progress on the Energy Review. (our emphasis)*” is to be interpreted, in our opinion as immediately before and probably in contemplation of that speech. It does not extend to every briefing Before 16<sup>th</sup>. May, 2006, regardless of proximity. FOE plainly sought this information with a view to discovering what had recently produced an apparently sudden change in the Prime Minister’s view. We agree with the Cabinet Office, therefore, that Documents 16 and 17 are not within the terms of the Request.

(ii) The required Schedule of lawfully withheld documents

We agree with the IC that the creation of such a schedule does not amount to the creation of new information. On the other hand, we find no provision in FOIA or EIR, nor was any cited to us, which empowers the IC or the Tribunal to require the provision of such material. FOIA ss. 1(1), 16 and 17 define the obligations of the authority

which receives a request. The duty of the public authority is to say whether it holds information of the kind requested and to provide it, subject to such exceptions or exemptions as are properly relied on. It must provide reasonable advice and assistance to the requester in preparing or refining his request. (s.16). It must identify the exemptions on which its refusal relies (s.17). It is not required to prepare summaries of information which, by virtue of such exceptions/ exemptions, it is not obliged to disclose.

(iii) EIR or FOIA ?

As to information of which disclosure remains in issue, the Cabinet Office argues only that certain passages in documents 4, 5, 6 do not constitute “environmental information” as defined in EIR reg. 2, hence are information governed by FOIA. In our judgement, decisions as to which regime applies should not normally involve minute analysis of each paragraph of a closely – argued document but rather a careful appraisal of the information contained in the document as a whole. “Environmental information”, so far as material to this appeal is defined in Reg. 2 (1) as having :

*“ . . .the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on -*

- (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine*

*areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*

That is a very broad definition which, in our view, clearly encompasses all the information in question. We should add that here, as in many cases, the result of this appeal does not depend on which statutory regime applies. In relation to central government, the relevant exception under EIR Reg. 12(4)(e) (disclosure of internal communications) corresponds closely to the FOIA exemption in s.35(1) (a) and (b) and the balancing of public interests, to which we shall come, is, subject to the presumption in favour of disclosure (Reg. 12(2)), a broadly similar exercise, whether under FOIA or EIR.

- (iv) Late reliance on exceptions

Whether a public authority has a right to advance a new exception or exemption for the first time before the Tribunal has produced conflicting decisions of the Tribunal<sup>1</sup>. We do not propose to enter the lists on this issue. As to documents 4 and 5, the Cabinet Office now wishes to rely on the exceptions provided by Reg. 12(5)(a) (adverse effect on international relations) and 12(5)(e) (adverse effect on the confidentiality of commercial information). The evidence that such exceptions are engaged seems rather flimsy but no decision on this matter is needed in the light of our findings, set out below, as to the engagement of Reg.12(4)(e) and the public interest in maintaining that exception in relation to this information.

(v) “Internal communications” – EIR Reg.12(4)(e)

It is common ground that this exception is engaged in respect of all the material which remained in issue and which is identified in the Substituted Decision. Given our ruling as to the scope of the Request, we are concerned with Documents 1, 3, 4, 5, 6, 15(a) and 15(c). The relevant material is of four kinds :

- (a) Briefing notes from Mr. Malcolm Wicks, Minister for Energy to the Prime Minister for the energy review meeting of 15<sup>th</sup>. May, 2006 (Documents 4 and 6).
- (b) Briefing notes from officials or special advisers (Documents 3 and 5)

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<sup>1</sup> *Home Office & Ministry of Justice v IC* [2009] EWHC 1611 Admin and *DEFRA v IC ( Birkett)* (EA/2009/0106)) exemplify the view that the Tribunal has a discretion. In *Home Office v IC* (EA/2010/0011)) the Tribunal ruled that it had a duty to consider exemptions not relied on before the Decision Notice..

- (c) A report from a Cabinet office official to the D.T.I. on the meeting of 15<sup>th</sup>. May, 2006, reflecting the contributions of various ministers (Document 1).
- (d) A draft of the consultation paper of 23<sup>rd</sup>. January, 2006 entitled “Our energy future” with attached minute ( Document 15(a) and (c)).

(vi) The public interest

Drawing on the evidence of Sir Paul and Mr. Rickett, the Cabinet Office relied strongly on the importance of the principle of collective responsibility as a powerful argument against disclosure of the views of ministers, controversial or not, within eighteen months of the briefings and meetings referred to, when the formulation of energy policy was still being developed. It also emphasised the now – familiar “chilling effect” of premature disclosure on the imparting of frank and fearless advice by officials or special advisers and its recording. As to the disclosure of rejected options and discarded proposals, it argued, as had Mr. Rickett, that this would merely confuse rather than enlighten the public.

The IC submitted that certain disagreements within the then government were already notorious and that the public had a particularly strong claim to transparency where environmentally sensitive issues such as nuclear power were involved. He argued further that the Prime Minister had chosen to disclose in part the development of government thinking on the issue and it was right that the background to his speech should be revealed so that the public could judge whether it was being open or

disingenuous. Energy policy had been effectively settled by the time of the material Request.

(vii) Our conclusion

- We recognise the very substantial public interest in energy issues, especially where nuclear power is concerned. There is a powerful interest in the disclosure of government thinking and policy – making in this area.
- The Prime Minister aroused understandable concern, even alarm, among opponents of nuclear expansion by what he said as to energy policy in his speech to the C.B.I.
- On the other hand, this Request was made in September, 2007, less than eighteen months after the energy review meeting and at a time when, we find, policy was still in the process of formulation.
- All the ministers involved, though the Blair administration had ended, remained active in political life, in some cases in ministerial roles.



- The Tribunal has in other appeals <sup>2</sup>acknowledged the fundamental importance of the principle of collective responsibility in maintaining firm and coherent government. It applies not just to the minutes of Cabinet meetings but to all significant communications from one minister to another . It extends to documents, such as reports of meetings (e.g., Document 1) which relay the opinions of ministers present
- Acknowledging the importance of informing the public on these issues, we conclude that briefings by the responsible minister to the Prime Minister, setting out his views on energy issues, were still entitled to be treated as confidential in September, 2007 and probably for a substantial time thereafter.
- In so far as other documents reveal the roles or submissions of ministers to the meeting of 15<sup>th</sup>. May, 2006, we consider that the same principle applies.
- The same goes for those passages which refer to the position taken by a minister or group of ministers in relation to the issues discussed.
- Given the timing of the Request, we judge that the discussion of policy options and risks contained in Document 5, a briefing prepared by officials and/or

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<sup>2</sup> *The Cabinet Office v Information Commissioner (Lamb) (The Iraq war) EA/2008/0024 ; The Cabinet Office v Information Commissioner (The Westland affair) EA/2010/0031*

advisers for an energy review meeting on 9<sup>th</sup>. May, 2006 should also be withheld. This is not to protect the sensibilities of the authors, who are not in any case identified, but because this is an example of policy in the making, requested when that policy was still subject to discussion within government. The “safe space” argument has some force here. For the avoidance of doubt, we do not resile in any way from what the Tribunal said in *DFES v IC and Evening Standard EA/2006/0006* at paragraph 75(vii) as to the courage and independence which is expected from and routinely demonstrated by senior civil servants in the advice which they give to ministers.

- We think that there is a clear distinction to be drawn between such briefings and the drafts of consultation papers to be placed before the public. We do not accept that the public is at risk of confusion if informed of rejected options.
- These principles are not, on balance, affected by the Prime Minister’s decision to trail nuclear policy on 16<sup>th</sup>. May, 2006, if that is what he was doing.

We have applied these tenets to the information contained in those documents as to which disclosure issues remained. The resulting analysis is contained in a brief closed annex.

19 To the extent indicated this appeal is allowed.20 Our decision is unanimous

20 This decision is unanimous.

Signed on the original

D.J.Farrer Q.C.

Judge

Date 4<sup>th</sup> October, 2010