



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

**Case No. EA/2014/0223**

**ON APPEAL FROM:**

**Information Commissioner's  
Decision Notice No: FS50526263  
Dated: 22 July 2014**

**Appellant: CABINET OFFICE**

**Respondent: INFORMATION COMMISSIONER**

**Heard at: Breams Buildings, London**

**Date of hearing: 12 February 2015**

**Date of decision: 22 July 2015**

**Before  
CHRIS RYAN  
(Judge)  
and  
ROSALIND TATAM  
PIETER DE WAAL**

**Attendances:**

For the Appellant: Rory Dunlop  
For the Respondent: Laura Elizabeth John

**Subject matter:** Qualified exemptions

- Formulation or development of government policy s.35(1)(a)
- Ministerial Communications s.35(1)(b)
- Operation of Ministerial private office s.35(1)(d)

Public interest test s.2

**DECISION OF THE FIRST-TIER TRIBUNAL**

The appeal is allowed in part and the Decision Notice dated 22 July 2014 is substituted by the following notice:

**Decision Notice**

**Public Authority: The Cabinet Office**

**Decision:** The directions for disclosure in the Decision Notice dated 22 July 2014 shall stand save that the information to be redacted prior to disclosure shall include, in addition to the information identified in the Confidential Annex to the Decision Notice, the information identified in Confidential Appendix B to the decision of this Tribunal.

**REASONS FOR DECISION**

Summary

1. This appeal arises out of a request made on 2 December 2013, under section 1 of the Freedom of Information Act 2000 ("FOIA"), for the disclosure of the full contents of a document entitled "Getting your bill through the House of Lords – A guide for bill teams by the Government Whips Office House of Lords" ("the Guide"). We have decided that the Guide as a whole is exempt information under FOIA section 35(1)(a) and (b) and that a few passages are exempt under FOIA section 35(1)(d). Each of those exemptions is a qualified exemption and we have decided that the public interest in maintaining the relevant exemptions outweighs the public interest in disclosure of those passages identified in Confidential Appendix B to this decision, but that the remainder of the Guide should be disclosed.

Background

2. FOIA section 1 imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it is not required to be

disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b), if:

*“in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information”*

3. The Guide is a document that reproduces or summarises much of the explanation of procedural rules and information on the operation of the House of Lords that appears also in publicly available documents such as “Guide to making legislation”, published by the Cabinet Office, and the House of Lords’ own publication “Companion to the Standard Orders” (“the Companion”). However, the Guide goes further in providing commentary and advice on the effective application of the House’s procedures.
4. The Cabinet Office refused to comply with a request for disclosure of the Guide because, it said, it included politically sensitive material, known only to certain officials and Members of the House of Lords, such that disclosure would give rise to a number of problems. This, it said, entitled it to rely on certain exemptions arising under FOIA section 35 to refuse disclosure of any part of the document.
5. Following a complaint to the Information Commissioner he issued a Decision Notice on 22 July 2014, in which he decided that the exemption provided under FOIA section 35(1)(a) (formulation of government policy) was engaged but not that under section 35(1)(b) (Ministerial communications). He then considered the public interest test required by FOIA section 2(2)(b). He allowed the Cabinet Office to withhold a relatively small part of the information in the Guide but ordered the rest of it to be disclosed.

### The Appeal

6. The matter comes before us on appeal by the Cabinet Office from that Decision Notice.
7. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Frequently, as in this case, we find ourselves making our decision on the basis of evidence that is more extensive than that submitted to the Information Commissioner.
8. The relevant parts of FOIA section 35 read:

*“(1) Information held by a government department ...is exempt information if it relates to-*

- (a) the formulation or development of government policy,*
- (b) Ministerial communications*
- (c) ...*
- (d) the operation of any Ministerial private office.”*

Section 35(5) defines “*Ministerial communications*” as “*any communications...between Ministers of the Crown*”.

9. FOIA section 35 is categorised under section 2(3) as a qualified exemption.

#### Issues arising on the Appeal

10. The issues to be determined on this appeal are:
  - a. Whether FOIA section 35(1)(b) is engaged on the basis that the Guide is, or relates to, a Ministerial communication (in that it relates to documents described as the handling strategy for a bill, each of which is itself a Ministerial communication);
  - b. Whether the Guide, or parts of it, relate to the operation of any Ministerial private office so as to engage the exemption under FOIA section 35(1)(d);
  - c. In light of the exemption found to have been engaged in the Decision Notice (section 35(1)(a)) and any other exemptions which we decide are engaged, whether the public interest factors in maintaining the exemptions (either alone or in aggregation) outweigh the public interest in disclosure.
  - d. Is the cumulative effect of the public interest factors in favour of maintaining the exemptions such that the whole Guide should be withheld (as opposed to it being disclosed with appropriate redactions)
  - e. Whether certain information in the Guide about individuals working in the office of the Government Chief Whip should be withheld on the grounds that it constitutes the personal data of those individuals.

#### Evidence – broad description and status

11. The Appellant's evidence consisted of a witness statement signed by Julia Labeta, the Principal Private Secretary to the Leader of the House of Lords and the Government Chief Whip in the Lords. The witness statement was supplemented by oral evidence which Ms Labeta gave during the hearing in response to questions put to her by both her own counsel and counsel for the Information Commissioner. Shortly before the hearing the Appellant also submitted, in closed, a version of the Guide incorporating a number of comments, which expanded on the

Appellant's case by reference to individual passages. Ms Labeta confirmed during her oral evidence, also in closed, that she had been the author of those comments and we have treated that material as also comprising part of her evidence.

12. Much of the evidence considered the detailed content of the Guide and was therefore dealt with by the Tribunal as closed material, not available to the public, as its disclosure would otherwise have the effect of pre-judging our decision. Our summary of Ms Labeta's evidence below is limited to what she either wrote in open format or said in open session during the hearing before us.
13. A draft of this decision, submitted to the Cabinet Office and the Information Commissioner before promulgation to enable them to check for inadvertent disclosure of confidential information, included the gist of some of the closed evidence at a level of generality which we believed struck the correct balance between the Cabinet Office's claim to closed status and the interests of open justice. The Cabinet Office disagreed with that approach in respect of several passages and argued, in a written submission, that those passages should be removed. We have adopted the following procedure to address the Cabinet Office's concerns:
  - a. Part 1 of Appendix A to this decision sets out those parts of the disputed information which the tribunal has decided are not exempt from disclosure and should be disclosed. In addition to identifying the relevant passages this part of the Appendix also reflects our reasoning in respect of each item and includes references to parts of the closed evidence which we believe are not required to be kept confidential and should also be recorded in an open decision.
  - b. In Part 2 of Appendix A we set out a Ruling providing our reasons for including references to the relevant parts of the closed evidence in Part 1 of the Appendix.
  - c. Appendix A is to remain confidential until either the time for appealing this decision has expired without an appeal being lodged or, in the event that such an appeal is lodged, the appeal has been dismissed.
  - d. Appendix B to this decision reflects those parts of the disputed information which the tribunal has decided are exempt from disclosure and may be withheld. By its nature, Appendix B is to remain confidential and will not be made public unless and until the Upper Tribunal or a Court hearing a further appeal on this case from the Upper Tribunal shall order otherwise.

Evidence – detailed content

14. We found Ms Labeta to be a clear, composed and truthful witness. She was, however, in the unenviable position of being both witness and the individual responsible for instructing the Cabinet Office's legal team. Inevitably, she therefore found herself drawn into the debate on legal issues when answering questions put to her by counsel for the Information Commissioner and by the Tribunal panel. As will be apparent from this decision we did not feel able to accept, on every issue, that her concerns as to the damaging effect of disclosure of some of the disputed information were wholly justified.
15. Ms Labeta has held a number of posts since joining the House of Lords as a Clerk in 2007. She stated that she had acquired detailed experience of the way the House operates and the information to which different types of members would be privy, as well as their level of knowledge of the procedures and practices of the House. One element of those practices was the level of cooperation between the Government and Opposition Leaders and Whips (and their business managers), which was essential for the effective conduct of business. The channel of communication that facilitated cooperation was referred to throughout Ms Labeta's evidence as "the usual channels".
16. Ms Labeta's evidence also included explanations of particular aspects of the internal administration of ministerial private offices and the procedures that apply in the House of Lords. This had particular relevance to explanatory passages in the Guide, which were debated during closed sessions of the hearing in the context of the exemptions claimed. We expand on those parts of the evidence in the two Appendices to this decision.
17. The Government Whips team in the Lords comprises the Government Chief Whip, the Deputy Chief Whip and a further eight Government Whips. Ms Labeta's evidence (which was not challenged by the Information Commissioner) was that each Government Whip in the House of Lords had the same constitutional position as departmental ministers and should properly be regarded as a Minister of the Crown. In cases where the Government does not have a relevant departmental Minister in the Lords one of the Whips will take responsibility for guiding a government bill through the legislative procedures. In every case the lead bill minister will be supported by a team of officials, who are referred to as "the bill team". The support will include briefing the minister on the content of the bill and of any amendments proposed by members of the House of Lords, as well as preparing speaking notes for use during debates in either Chamber or Committee. The bill team is also responsible for preparing a draft handling strategy for the bill and for advising on the effective implementation of that strategy to ease the bill's passage and manage any potential objections. It is, however, the lead bill minister who retains overall responsibility for steering a bill through the House.

18. The purpose of the Guide was to give detailed guidance to Ministers and bill teams on bill management throughout the passage of a bill through the House of Lords. As its name indicates, the Guide was addressed principally to government officials working on bill teams but Ms Labeta confirmed that it was also distributed to (and, she believed, referred to by) all Lords departmental ministers and all Government Whips.
19. The evidence on the authorship of the Guide, according to Ms Labeta's open evidence, was that the individual holding the office of Government Chief Whip at the time put her name to the foreword. Additional evidence on the point appears in Part 1 of Appendix A to this decision (see paragraph 13 above).
20. A different version of the Guide had existed before the general election in 2010. It was then tailored to meet the new circumstances arising from the formation of a coalition government at that time. Further updated versions have been issued from time to time since. The one that was current at the time of the information request was published in October 2013. Ms Labeta made no attempt to disguise the fact that much of the Guide's content would be familiar to, for example, members who had sat on the government's front bench during previous administrations and back-bench members who had past experience of proposing or opposing legislation in the House of Lords. (This much was evident, also, from the contents of the Companion and the publicly available "Guide to making legislation", both referred to above.) However, Ms Labeta laid stress on particular passages that addressed, specifically, issues likely to arise as a result of the current composition of the coalition Government, which would not be known outside those provided with a copy of this version and which had, in her view, particular sensitivity.
21. Ms Labeta had particular concerns about the possible disclosure of the Guide outside the limited group of people to whom it had been issued. First, she feared that the Guide disclosed information about particular tactics, known to some Members but not all, which could be deployed against the Government in order to delay or frustrate the passage of legislation. Secondly, she identified certain passages which she thought might be misconstrued for political purposes. Other passages might be misconstrued in a way that would undermine collective responsibility among Ministers in that, for example, a Minister responsible for the passage of a bill through the House might be forced to defend the adoption of a procedural device which the Guide had suggested was not best practice to pursue. Ms Labeta considered that those factors, and possibly others, could have the effect of discouraging those preparing future versions of the Guide from including sensitive advice, with the result that future versions would be less helpful to those managing a future government's legislative programme. There would, she said, be less information provided in writing and greater reliance on telephone consultation. She thought

that this would leave some bill teams without the support and assistance they currently derive from a publication which seeks to preempt the questions that might otherwise be submitted orally to the Whips' office. Finally, Ms Labeta expressed concern about the possible disclosure of information about the internal administration of ministerial private offices, to the disadvantage of those trying to manage the government's business in the House of Lords.

The debate on the issues and our decision on each

*Is the Guide a Ministerial Communication and/or does it relate to a Ministerial Communication?*

22. The Information Commissioner decided that the Guide was not a Ministerial Communication. He accepted that a communication did not have to be exclusively between Ministers in order to fall within the definition set out in FOIA 35(5) but had to be written by one Minister and directed to one or more other Ministers to qualify, even if others were copied in. In this case, he argued, the fact that a Minister contributed the Foreword to the Guide did not make her its author and it was addressed to officials working together as members of a bill team rather than to the Minister sponsoring a bill. However, in light of Ms Labeta's evidence on the purpose of the Guide and the manner in which it is distributed we have concluded that it was clearly adopted by the Chief Whip, even though the detailed authorship had been undertaken by members of her office, and equally clearly intended to be a communication to other Ministers. It was directed at those responsible for the passage of bills through the House. The individuals taking prime responsibility for that task would be the relevant lead Ministers. The fact that much of the detailed support work would be delegated by those Ministers to officials on the bill team does not detract from that fact. The purpose of the Guide was to assist those Ministers in the discharge of the task for which they had accepted responsibility. It was intended to steer them, as well as those supporting them, through the processes that need to be completed if a bill is to be passed.

23. We conclude, therefore, that the Guide is a Ministerial Communication and that it therefore constituted exempt information under FOIA section 35(1)(b).

24. Having reached that conclusion in respect of the whole of the Guide, it is not necessary for us to consider whether parts of it would also fall within section 35(1)(b) because they relate to the Handling Strategy (an argument which the Information Commissioner accepted).

*Does the Guide relate to the operation of a Ministerial private office?*



25. This issue was not raised during the investigation which the Information Commissioner undertook and is not therefore referred to in his Decision Notice. The Cabinet Office did not fully develop its case on this issue until it provided the annotated version of the Guide referred to in paragraph 11 above. We have explained in the Appendices to this decision our decisions on whether or not individual passages of the Guide fall within the scope of the exemption. We can say in this open part of our decision that we found that on several occasions the passages relied on by the Cabinet Office described, in general terms, functions that the Whips' office undertook but not the manner of operation within the office that enabled it to do so. We did not accept that such information fell within the scope of the exemption relating to operations of a Ministerial private office. However information relating to the timetable the office operated for dealing with a particular stage of the legislative process and explanations of the manning arrangements, as well as the responsibilities assumed by particular individuals within the office, does fall within the exemption, as the Information Commissioner to some extent conceded.
26. Although it was suggested to us in argument that the application of the public interest test may raise different issues, depending on which of the available exemptions applied, we did not find, in practice and as explained in the Appendices, that anything significant turned on this.

*The application of the public interest test*

27. Because the arguments and evidence presented to us related closely to particular passages of the Guide we have dealt with them, on a passage by passage basis, in the two Appendices that are attached to this Decision.
28. In this main body of our decision we record that the public interest factors relied on in favour of maintaining relevant exemptions included the suggestion that disclosure would have the following consequences:
- a. It would disclose to Peers tactical advice which might enable them to delay or frustrate the passage of legislation with possible direct impact and indirect impact (in terms of the chilling effect on authors of future editions of the Guide);
  - b. The principle of ministerial collective responsibility would be undermined (at least to the extent that the Chief Whip would find it difficult to maintain a credible defence of steps taken by a bill Minister if they appeared to conflict with advice in the Guide);
  - c. It might lead to possible interference with the effective operation of the "usual channels" in the House of Lords, i.e. the channel of communication through which the Whips for, respectively, the Government and the Opposition manage the business of the House, notwithstanding their political differences and competing interests; and
  - d. (In respect of some passages) the security of the Houses of Parliament might be prejudiced by disclosure.

In each case it was suggested that the harm might be both direct and (in terms of the chilling effect on authors of future editions of the Guide) indirect.

29. The outcome of the detailed considerations recorded in the Appendices is that some of the passages which the Cabinet Office regarded as being particularly sensitive may be withheld but others require to be disclosed.

*Should the whole Guide be withheld or should it be disclosed in redacted form?*

30. We have decided that, once the passages identified in Confidential Appendix B have been redacted, there would be no material public interest in maintaining the exemption/s for the document as a whole. Against that, and notwithstanding the existence of other publicly available material explaining the procedures of the House, we believe that there is a strong public interest in the publication of the approach of the Whips' Office to those procedures. We reach that decision notwithstanding the argument by the Cabinet Office that it was not just the particularly sensitive passages which it identified in its evidence that should be withheld, but the guide as a whole. We do not believe that, in its redacted form, the Guide would undermine the principle of ministerial collective responsibility or that the guidance provided would need to be significantly reduced, in scope or candour, in future editions. Those writing a document of this nature should have been aware that, since the FOIA was brought into operation, there was a risk that it would have to be disclosed either in whole or (in light of the way that we have applied it) in redacted form. There should be no greater chilling effect in the future, as a result of this decision, than would have existed for the last decade.

*The redaction of personal data*

31. In broad terms the effect of FOIA section 40(2) is that an individual's personal data is exempt information if its disclosure would breach any of the data protection principles set out in Schedule 1 to the Data Protection Act 1998. The case on this aspect of the appeal developed and changed over time, particularly as it became clear that some of the personal information which the Cabinet Office sought to withhold had already been put into the public domain in documents made available to the public by the House of Lords itself. We were ultimately satisfied that the names of certain, relatively junior employees, together with other information that might enable them to be identified or contacted (by telephone or email) should be redacted from the Guide before it was released to the public. The detailed information to which this part of our decision relates is set out in Confidential Appendix B.

Conclusion

32. We have decided that the Decision Notice was in error in rejecting the Cabinet Office's claim that the Guide was exempt information under FOIA section 35(1)(b) and in limiting the redactions to be made before publication to those set out in its Confidential Appendix. We have also decided that the argument presented for the first time on this appeal, to the effect that FOIA section 35(1)(d) applies to certain passage of the Guide, was persuasive in respect of some passages (identified in Confidential Appendix B) but not in others (identified in Appendix A). Finally, we have decided, in light of the further evidence presented on the appeal, that the disclosure of information about certain individuals should be slightly less extensive than the Information Commissioner directed.

33. Our decision is unanimous.

Judge Ryan  
22 July 2015