IN THE FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

(INFORMATION RIGHTS) **Case No. EA/2009/0038**

ON APPEAL FROM:
Information Commissioner
Decision Notice ref FS50160256
Dated 6 April 2009

Appellant: Department for Culture, Media and Sport

Respondent: Information Commissioner

Heard at: **Employment Appeal Tribunal**

Date of hearing: **20 and 21 November 2009**

Date of decision: **22 February 2010**

Before

HH Judge Shanks

Roger Creedon

Jacqueline Blake

Representation:

Eleanor Grey and Rory Dunlop for the Appellant.

Timothy Pitt-Payne for the Respondent.

Subject areas covered:

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

Ministerial Communications s.35(1)(b)

Personal data s.40

Legal professional privilege s.42

Cases referred to:

DEFRA v Information Commissioner EA/2009/0039 (15.10.09)

Export Credit Guarantee Dept v Information Commissioner EA/2009/0021 (21.10.09)

Ofcom v Information Commissioner [2009] EWCA Civ 90 and [2010] UKSC 3

R (on app of British Casino Association Ltd et al) v Secretary of State for Culture Media and Sport [2007] EWHC 1312 (Admin)

Decision

The Tribunal allows the appeal in part and substitutes the following decision notice in place of that issued by the Information Commissioner dated 6 April 2009.

Substituted Decision Notice

Dated 19 February 2010

Public authority: Department for Culture, Media and Sport

Name of Complainant: Latham & Watkins

For the reasons set out below, the substituted decision is that:

(1) the following withheld documents (or parts) fall outside the scope of the request and need not be disclosed: pp 59-62, 95 and (in part) 97;

(2) section 35(1)(a) was engaged in relation to all the remaining withheld documents (or parts);

(3) section 35(1)(b) was also engaged in relation to the following documents: pp 63-66, 82-84, 90-91 and 92-94;

(4) the public interest in maintaining the exemption at sections 35(1)(a) (and (b) if appropriate) outweighed that in disclosure in relation to the following documents (or parts): pp 1, 30/31(para 7), 31(para 8), 32-37, 64 (para 5), 72-81, 90-91 and 92-94;

(5) the public interest in maintaining the exemption at sections 35(1)(a) (and (b) if appropriate) did not outweigh that in disclosure in relation to the following documents (or parts) which accordingly ought to have been disclosed at the time of the request: pp 5, 28, 30 (para 4), 39, 48-52, 55 (para 16), 58B (para 11), 63-66 (except para 5 p64), 67-71, 82-84, 85-89;

(6) section 40(2) was engaged in relation to the names and contact details of junior officials mentioned in such documents and the Public Authority was entitled to redact those names and details when making disclosure;

Action Required

The Public Authority must disclose to the Complainant the following documents or parts of documents (redacted where appropriate to remove junior official's names and contact details) by 26 March 2010: pp 5, 28, 30 (para 4), 39, 48-52, 55 (para 16), 58B (para 11). 63-66 (with para 5 of p 64 redacted), 67-71, 82-84, 85-89.

Dated this 19 day of February 2009

Signed

HH Judge Shanks

Reasons for Decision

Background facts

1. The Bill which later passed into law as the Gambling Act 2005 was introduced to the House of Commons on 18 October 2004. The Bill was the product of much work and consultation, starting with the report of the Gambling Review Body chaired by Sir Alan Budd in July 2001, and involved a substantial liberalisation of gambling law in general and the law relating to casinos in particular.

2. As introduced the Bill did not contain any limit on the number of casinos which might be licensed under the new law but, following a stormy reception in Parliament, the Government decided to introduce a cap on the number of "regional" casinos (there being three categories, regional, large and small). On 16 November 2004 Richard Caborn, the Minister for Sport and Tourism at the Department for Media, Culture and Sport (DCMS), stated to the Standing Committee considering the Bill:

> **We have taken careful note, as promised, of the concerns raised on Second Reading about the casino proposals in the Bill, particularly the provisions for regional casinos. In the debate, there was a large measure of support for the view that the proposed licensing controls, working alongside the planning system, would not be strong enough to guard against the proliferation of gambling facilities hitherto untested in this country or against the location of regional casinos in unsuitable areas…**
>
> **We have therefore decided to amend the Bill…**
>
> **As an additional reassurance we will limit the number of regional casinos in the first phase to eight…**
>
> **When tabling amendments, we shall set out in detail our proposed arrangements for determining where regional casinos will be located and how licences to run them will be awarded, any consequential changes relating to other categories of**

casino to avoid the proliferation of small or large casinos, and other such matters on which a number of views have already been expressed.

3. On 16 December 2004 Mr Caborn made a further announcement to the Standing Committee in which he stated:

The Government recognise…that the casino proposals in the Bill represent a significant change and that we need to take a cautious approach to assess whether their introduction will lead to any increase in problem gambling. We have taken the view that the risk of an increase in problem gambling will be reduced if a limit is imposed on the number of casinos. We announced our intention to set a limit on the number of regional casinos, and I said at the time that the Government would consider whether any consequential changes were necessary to avoid proliferation of other categories of casino. Our conclusion is that the limit on the number of regional casinos will lead to a significantly greater rise in the number of small and large casinos than would otherwise have been the case.

That has made us reconsider the potential risk posed by small and large casinos. We now believe that, as with regional casinos, it is right to set an initial limit of eight each on the number of large and small casinos.

On the same day the Government issued a Statement of National Policy on Casinos which included the words of the Minister's announcement and set out details of the Government's policy in relation to the location of new casinos and the role of the proposed Advisory Panel on new casino locations.

4. The Bill was entering its final stages in April 2005 when the May 2005 election was announced. The co-operation of the Opposition was required in order to secure the passage of the Bill in the then current Parliament. Following discussions between representatives of the parties, on 6 April 2005 Lord MacIntosh of Haringey, the DCMS Minister in the House of Lords, announced the following:

In another place the opposition proposed an amendment which would have applied a limit of four to regional casinos. They have now maintained that that is too high and that there should be no more than a single regional casino in the first place. They have made it clear that their support for the passage of the Bill is contingent on such a limitation.

…

In the case of regional casinos an initial limit of one rather than eight is consistent with the precautionary principle. We have therefore agreed with the opposition that the Bill should be amended to provide for one regional casino licence, rather than eight.

5. With that concession the Bill was passed and it received Royal assent on 7 April 2005. Section 175 of the Act was headed "Casino premises licence: overall limits" and included these provisions:

(1) No more than one casino premises licence may have effect at any time in respect of regional casinos.

(2) No more than eight casino premises licences may have effect at any time in respect of large casinos.

(3) No more than eight casino premises licences may have effect at any time in respect of small casinos.

(4) The Secretary of State shall…by order make provision for determining the geographical distribution of casino premises licences within the limits specified in subsections (1) to (3)…

(8) The Secretary of State may by order-

(a) amend any of subsections (1), (2) and (3) so as to substitute a new maximum number of casino premises licences…

There was also provision in the Act for statutory instruments to define the exact parameters of "regional", "large" and "small" casinos.

6. Once the Act had been passed 50 or 60 pieces of secondary legislation were required fully to implement the new regime (which it was intended would come into force on 1 September 2007) and controversy continued to surround it. In particular the issue of where the new casinos would be located remained an area of controversy (particularly in relation to the single regional casino), partly because there were several local authorities competing for casinos in their area and partly because there was a body of opinion opposed on moral grounds to the very idea of

more casinos. The Government's Casino Advisory Panel was appointed in October 2005 to advise on the location of the 17 new casinos and consulted widely including holding public meetings which became a focus for such controversy. Controversy was also heightened by a story appearing in the press in summer 2006 linking the Deputy Prime Minister to the owners of the Millennium Dome, which was one of the possible sites for the regional casino.

7. On 30 January 2007 Tessa Jowell, the Secretary of State at the DCMS, announced the recommendations of the Panel, including the recommendation of Manchester for the regional casino; in the course of her announcement she stated:

> **…we cannot and will not even consider allowing further casinos until a proper evaluation over time has been made of the social and economic effects of the 17 casinos…**
>
> **…I therefore wish to make it crystal clear to the House that those safeguards preclude any consideration of further casinos for the lifetime of this Parliament.**
>
> **…I am minded to return to this House at the earliest opportunity with an order that will enable Parliament to consider the panel's recommendations and to vote on them.**
>
> **The order will be subject to the affirmative resolution procedure and the debate will be held on the Floor of the House…That means that Parliament, rightly, will determine the outcome of the process.**
>
> **…I recognise that gambling will always be a sensitive issue, and I understand the reservations that some hon. Members and others have about it, and about casinos. However, I have always sought to ensure that the Government proceed cautiously on this matter, with the strongest possible safeguards in place and on the basis of the best evidence of public protection in the face of what is, undeniably, rising public demand. That is what is we have done.**

Following that announcement secondary legislation was prepared to reflect the recommendations of the Casino Advisory Panel. As the Secretary of State had stated, the legislation required a positive resolution of both Houses of Parliament and in March 2007 it fell in the House of Lords, only the third time since the 1960s that the Government had lost a vote on an affirmative resolution.

8. There was also continuing controversy after the Act was passed about the effect of the new regime on existing casinos and the proposed transitional provisions relating to them, which led to judicial review proceedings brought by the British Casino Association and others. We were told that permission was granted for the judicial review in April 2007 and the case was heard in May and decided in June 2007 (see: *R (on app of British Casino Association Ltd et al) v Secretary of State for Culture Media and Sport* [2007] EWHC 1312 (Admin)), ie all after the relevant date for the purposes of this appeal (see below: February 2007), but the judicial review concerned two sets of draft regulations (relating to categories of casinos and gaming machines respectively) and a transitional provisions Order which had all been produced in 2006 and the letter before action had been sent on 11 December 2006.

The request for information and the decisions of the public authority and the Information Commissioner

9. The request for information under the Freedom of Information Act 2000 which gives rise to this appeal was made by Latham & Watkins solicitors to DCMS on 7 August 2006. The request related to the Government decisions which we have described in paragraphs 1 to 5 above to limit the numbers of various categories of casino. On 21 August 2006 it was expressly agreed that the request would be treated as covering:

   (a) any objective external assessment that led to the adoption of first the 8-8-8 policy and then the 1-8-8 policy;

   (b) any advice from officials to Ministers that led to those decisions being taken.

10. On 22 September 2006 DCMS responded by stating that they had information falling within the scope of the request but that it was being withheld by virtue of the exemptions in sections 35(1)(a) (which covers "information if it relates to … the formulation or development of government policy"), 35(1)(b) ("Ministerial communications"), and 43 ("Commercial interests"). Latham & Watkins sought an internal review which upheld that initial decision on 26 February 2007. February

2007 is therefore the relevant date for considering the applicability of any exemptions and the public interest balance for the purposes of this appeal.

11. On 27 April 2007 Latham & Watkins complained to the Information Commissioner that the request had not been dealt with in accordance with the 2000 Act. The Commissioner's decision which is the subject of this appeal was issued on 6 April 2009. So far as relevant for the purposes of this appeal, he decided that the entire contents of the 19 or so withheld documents with which we have been concerned ("the withheld material") were covered by section 35(1)(a) but that the public interest in maintaining that exemption was outweighed by the public interest in disclosure. He also rejected DCMS's case that section 35(1)(b) was engaged in relation to some of the documents and he therefore ordered the disclosure of all the withheld material.

The appeal

12. On 30 April 2009 DCMS appealed under section 57 of the 2000 Act against the Commissioner's decision to this Tribunal on the grounds that:

    (1) the Commissioner should have concluded that the public interest balance in maintaining the section 35(1)(a) exemption outweighed the public interest in disclosure;

    (2) the Commissioner should have concluded that the section 35(1)(b) exemption was engaged in relation to those documents for which it was claimed;

    (3) where relevant the public interest in maintaining the two exemptions should have been "aggregated";

    (4) DCMS should be allowed to raise a new exemption, namely section 40(2) ("Personal information"), and to redact the names and contact details of relatively junior officials whose details appear in the withheld material.

13. In the course of the appeal there were the following relevant developments:

(1) DCMS disclosed a substantial part of the withheld material on the pragmatic basis that, although they still considered that they were entitled to withhold it at the relevant time, the balance of the public interest as at the date of the appeal would have required disclosure. We were accordingly supplied with a paginated bundle containing all the withheld material annotated to show the documents or parts of documents which DCMS still maintain should not be disclosed. We remind ourselves that, regardless of DCMS's pragmatic approach, we must consider the position in relation to the material which is still in dispute as at February 2007.

(2) DCMS served amended grounds of appeal dated 10 November 2009 raising an argument that there were three documents in the withheld material which ought not to have been included because, on further consideration, they were not in fact within the terms of the request. The Commissioner did not oppose the raising of this issue and the Tribunal is of the view that it is right that it should be considered even at this stage since, in a sense, the question of scope goes to the very jurisdiction of the Commissioner and thus the Tribunal. We accordingly grant DCMS leave to amend the grounds of appeal to raise this issue.

(3) DCMS's amended grounds of appeal also raised the exemption at section 42 ("Legal professional privilege") in relation to three documents (including two sets of draft or actual instructions to Parliamentary Counsel). The Commissioner did not accept that the Tribunal should consider this exemption at such a late stage and accordingly the Tribunal needs to consider whether to allow them to raise it at this stage.

(4) The Commissioner conceded that the Tribunal should both consider and allow the appeal in relation to the section 40(2) exemption: since this exemption affects the interests of third parties whose names and details are unlikely to add anything to the value of the information sought and the Commissioner did not oppose it, we are content to follow this course.

(5) The Commissioner accepted that the Tribunal was bound by the decision of the Court of Appeal in *Office of Communications v Information Commissioner* [2009] EWCA Civ 90 in relation to the aggregation issue (although that decision strictly speaking relates to the Environmental Information Regulations 2004) but he drew our attention to the fact that that decision was being appealed to the Supreme Court and invited us, if we considered that it may make a difference to the outcome in this case, to defer our decision until after the Supreme Court's judgment. Since then the Supreme Court has referred the case to the European Court of Justice with an indication that they are divided 3-2 in favour of the Court of Appeal's decision (see [2010] UKSC 3). Although it may have made sense in principle to await the outcome of the hearing before the European Court of Justice and the Supreme Court we do not believe that in this case it would make any practical difference whether the public interests arising under sections 35(1)(a) and (b) were aggregated or considered separately and we therefore decline the Commissioner's invitation and will consider them on the aggregated basis.

14. The outstanding issues for the Tribunal are therefore:

(1) whether the three documents (or part documents) identified by DCMS were outside the scope of the request;

(2) whether DCMS should be allowed to raise section 42 in respect of various documents or parts thereof and, if so, whether they were exempt by virtue of section 42;

(3) whether section 35(1)(b) was engaged in respect of various documents and parts of documents as well as section 35(1)(a);

(4) whether in all the circumstances of the case the public interest in maintaining any relevant exemptions (considered together) outweighed the public interest in disclosing the relevant withheld information.

15. Before turning to those issues we should record that in addition to seeing the withheld material and a large number of other relevant documents and having

helpful written and oral submissions from counsel, the Tribunal received evidence of high quality from three senior civil servants: Greig Chalmers worked in DCMS from June 2002 to January 2006 and was head of the Gambling Division Legislative Team while the Gambling Bill was passing through Parliament; Paul Bolt has been a civil servant since 1975 and has worked in DCMS since 1989 and been Director of Sport and Leisure at the department since April 2008 (though he was not in any relevant post in 2004-7); David Fitzgerald has been a civil servant since 1993 and was head of the Gaming and Lotteries Team from January 2005 and of the Gambling Division from October 2007 and he was involved in handling the request for information in this case: we accept his evidence that in considering the request he "…took an inclusive view of what to consider for release". We have taken account of their evidence both in our recitation of the background facts set out above and (save in so far as the evidence relates to events occurring after February 2007 which do not bear on the position before that date) generally in considering the issues raised in the appeal, including those relating to the public interest.

Issue (1): scope of request

16. In general the scope of a Freedom of Information Act request (which is what gives rise to and defines the obligations of a public authority under section 1(1) of the Act) must be determined by an objective reading of the request itself in the light of any relevant background facts. In this case the parties expressly agreed the scope of the request (see paragraph 9 above; only (b) of the agreement is relevant for the purposes of the appeal but it must obviously be read with (a)) and the Tribunal's task is to interpret the words of that agreement against the relevant background set out above. Based on this material, we are satisfied that the relevant policy decisions for the purposes of the request in this case were those to limit the number of casinos to 8-8-8 and 1-8-8 respectively and that the 8-8-8 policy decision was taken in two parts, by 16 November 2004 (to limit the number of regional casinos to eight) and by 16 December 2004 (to limit the number of large and small casinos to eight each), and that the decision to change to the 1-8-8 policy was made on or very shortly before 6 April 2005. We therefore consider that in order to come within the scope of the request in this case information must be (a) advice (b) by officials

(c) to Ministers (d) given before the relevant date (ie 16 November 2004, 16 December 2004 or 6 April 2005) (e) which is relevant to the various decisions to limit numbers of casinos.

17. Applying that test, we agree with DCMS that the three documents or parts which they identified were indeed outside the scope of the request for the reasons set out in the closed Annex B to this decision. We record that the Tribunal was of the view that there were other documents in the withheld material which were arguably outside the scope of the request but, since we did not hear detailed argument on the point in relation to these other documents and DCMS chose to take an inclusive view of what to consider for release, we have decided not to consider this further.

Issue (2): section 42

18. DCMS have submitted in effect that the Tribunal has no discretion whether or not to consider exemptions not raised at the time of the request and must consider them however late they are raised. As we made clear at the hearing this submission has been made by government departments on a number of occasions in the past and consistently rejected by the Information Tribunal[1] and we accordingly propose again to follow the well established jurisprudence on the question (namely that exemptions claimed late will only be entertained by the Tribunal if there is reasonable justification for doing so in all the circumstances) without considering this submission further, save to remark that in this case DCMS undoubtedly required leave to amend the Notice of Appeal to raise section 42 in any event.[2]

19. The following considerations are relevant to the question whether there is a reasonable justification for us now to entertain argument on section 42 (and accordingly the question whether leave should be granted to amend the Notice of Appeal):

    (1) The exemption was first raised at a very late stage: 3 ¼ years after the initial request and only eight days before the scheduled hearing;

[1] See eg *DEFRA v Information Commissioner* EA/2009/0039 paras 10-11
[2] See rule 11(1) of the Information Tribunal (Enforcement Appeals) Rules 2005; the equivalent new rule is rule 5(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber Rules 2009.

(2) In their submissions dated 17 November 2009, DCMS express regret for the "late application for an amendment" but the only explanation or excuse given is that "…preparation for the hearing involved a detailed consideration of the justification for … continued withholding of the disputed material, and decisions relating to that issue, which required high-level clearance, were finalised only very recently." Apart from the fact that no real explanation is given as to why the decisions were only finalised very recently, the focus of the explanation is somewhat misconceived: the public authority should consider at the time of the request whether exemptions apply, where the public interest lies and whether to rely on them and, if so, give notice of the fact under section 17; the subsequent procedure is in effect a review of the decisions made by the public authority at that stage and is not designed to be a search for new justifications for a decision already taken. We also note in this context that section 42 was in fact expressly raised by DCMS at the internal review stage in relation to information which is not relevant for the purposes of this appeal.

(3) The new exemption is based on a privilege which, by its nature, can be waived by the public authority and is not one that involves the rights of third parties, where obviously different considerations may apply.

(4) We accept that it may well have been possible to deal with the new exemption without adverse effect on the Tribunal's procedure, although consideration ought to have been given to the position of the original requestor (who had not been made a party to the proceedings) and it was far too late for that by the time the point was first raised.

(5) We also accept that DCMS may well be right when they say that the majority (or indeed all) of the public interest arguments related to legal professional privilege can be addressed in the context of section 35(1)(a): that argument of course "cuts both ways".

20. Taking account of those considerations we have come very firmly of the view that there is not sufficient justification for allowing section 42 to be raised now and that

we should therefore refuse leave for the proposed amendment to the Notice of Appeal.

Issue (3): section 35(1)(b)

21. The relevant parts of section 35 provide as follows:

> **(1) Information held by a government department … is exempt information if it relates to…**
>
> **(b) Ministerial communications…**
>
> **(5) 'Ministerial communications' means any communications**
>
> **(a) between Ministers of the Crown…**
>
> **and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet…**

It is clear that it is not only "Ministerial communications" themselves which are covered by this exemption but also other information which relates to such communications. Thus a draft of a letter sent from one Minister to another prepared by officials and held by the department would clearly be within the exemption. There was a debate between the parties as to whether the draft of such a communication which was never in fact sent could be said to relate to Ministerial communications. We regard this as a moot point but one which we are not required to decide because, as a matter of fact, it is clear that all the draft letters in the withheld material did result in letters which were sent between Ministers, and the Commissioner has rightly accepted that section 35(1)(b) does apply to those drafts and to the memos enclosing them.

22. The real issue which arises here is whether various draft or actual documents which are to be attached to letters between Ministers and are attached to the draft letters (in this case instructions to Parliamentary counsel and the Statement of National Policy we refer to at paragraph 3 above) "relate to" Ministerial communications. It seems to us that in the end such an issue can only be addressed on the particular

facts of the case by the Tribunal asking itself whether there is a sufficient connection between the document and the communication for it to be said that one relates to the other. In this case it seems to us that the documents we mention were prepared for the general purposes of progressing government policy and not for the purposes of the Ministerial communications as such and we therefore find, on balance, that they did not "relate to Ministerial communications". We take comfort from the fact that they clearly and indisputably relate to "…the formulation or development of government policy" and are therefore covered by section 35(1)(a), whose ultimate underlying public interest is the same as section 35(1)(b)'s, namely good government.

23. There is one other section of the withheld material which DCMS say is covered by section 35(1)(b) and which the Commissioner maintains is not. We consider that the issue in that case is simply one of fact and we find that section 35(1)(b) does not apply to the relevant information for the reasons we summarize at the beginning of Annex B which is a closed Annex.

Issue (4): public interest

24. All the withheld material is covered by section 35(1)(a) and we have concluded that a number of documents are also covered by section 35(1)(b). The Tribunal must therefore consider in respect of each piece of information whether in all the circumstances of the case the public interest in maintaining those exemptions (aggregated if appropriate) outweighed the public interest in disclosing it, in which case the Commissioner's decision will have been wrong to that extent. The proper approach to the public interest question in cases like this has been considered on many occasions and we have the authorities and the Information Tribunal jurisprudence well in mind, in particular the summary in the *ECGD* case (EA/2009/0021) which is helpfully set out in DCMS's skeleton argument. We set out in paragraphs 25 and 26 below the main considerations which we have taken into account in assessing the weight of the respective public interests.

25. There is clearly a public interest in the disclosure of information of the type requested in this case because such disclosure can potentially further (a) open and

transparent policy making, (b) government accountability, (c) public understanding of policy decisions and the process of decision-making and (d) public participation in decision-making by increasing public knowledge and understanding of the issues. The following considerations were of particular relevance in assessing the weight of the public interest in disclosure in this case:

(1) as the Commissioner put it in his decision notice (para 87), "…casino gaming policy was a matter of widespread public interest, involving significant controversy and social impact";

(2) the Bill as originally introduced did not include any provision for a limit on casino numbers and this had not featured in the extensive prior consultations;

(3) neither the 8-8-8 nor the 1-8-8 policy was consulted on and the 1-8-8 policy was introduced at the last possible moment;

(4) on the other hand, we accept Mr Chalmers's evidence that there is nothing in the evidence we have seen to suggest that the government's public statements about these policies were not true or that there was any "hidden agenda".

26. There is also a clear public interest in maintaining the exemptions provided by sections 35(1)(a) and (b) because keeping information relating to the formulation or development of government policy or Ministerial communications confidential can help the effective conduct of public affairs by encouraging the free and frank provision of advice and exchange of views within government and preserve the so-called "safe space". We also remind ourselves of the public interest in maintaining the convention of collective Ministerial responsibility which is supported by these exemptions, section 35(1)(b) in particular. The following considerations were of particular relevance in assessing the weight of the public interest in maintaining the exemptions in this case:

(1) The 8-8-8 policy had been superseded and the 1-8-8 policy enshrined in primary legislation by April 2005, nearly two years before the relevant date (ie the date of the DCMS internal review in February 2007);

(2) Although the 1-8-8 policy was to that extent "settled" it still remained in February 2007 a matter of considerable controversy and there were related issues (eg the location of casinos, definition of categories of casino, transitional arrangements for existing casinos) which remained open and controversial, with substantial interests at stake;

(3) We accept Mr Chalmers's evidence (a) that his team of civil servants dealing with the implementation of the new regime was small and included some quite junior civil servants whose work could easily be identified by those concerned and (b) that it was important that the team should keep up a good and productive relationship with "stakeholders";

(4) Many of the officials and politicians in post in 2004/5 were still there in February 2007.

27. Our conclusions on the balance of the public interests in relation to the various documents or parts still in issue are set out in two annexes, Annex A (which, unless there is an appeal, will be open) dealing with those where we have decided that in all the circumstances of the case the public interest in disclosure was not outweighed by that in maintaining the exemption(s) and Annex B (which is a closed Annex) dealing with those where we consider that it was. We deal with points of detail relating to specific documents or parts in those Annexes but we make it clear that we have taken account of all the background facts and relevant DCMS evidence and the matters referred to in paragraphs 25 and 26 in relation to each document or part we have considered.

Conclusion

28. The appeal is allowed in part. The detailed decisions in relation to different parts of the withheld material are reflected in the substituted decision notice set out above.

29. Our decision is unanimous.

30. Finally we note that, although we heard the appeal as an Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular articles 2

and 3 and paragraph 2 of Schedule 5) we are now constituted as a First-tier Tribunal for the purposes of making and promulgating this decision. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 and the new rules of procedure an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed

HH Judge Shanks

Dated 19 February 2010

Tribunals Service
Information Rights

Case No. EA/2009/0038

Appellant: Department for Culture, Media and Sport

Respondent: Information Commissioner

ANNEX A

This Annex shall remain confidential to the parties until 26 March 2010. Thereafter it shall be made public unless in the meantime DCMS have applied for leave to appeal in which case it shall remain confidential pending further direction of the First-tier or Upper Tribunal.

DOCUMENTS or parts of documents where Tribunal considers that the public interest in maintaining exemption(s) did not outweigh that in disclosure and which accordingly must be disclosed.

Page 5

There is reference in this policy note to choosing between competing bids by lot. DCMS say this a "radical idea" not pursued and that to disclose it would discourage officials from putting forward "blue sky" thinking. The Tribunal does not accept that the idea is radical or "blue sky" (or "eccentric" or liable to be derided by the media as Mr Bolt suggests) and in any event it was clearly a serious idea; nor can we accept that its disclosure as part of a serious piece of work by a senior official advising in relation to important issue would have the chilling effect contended for. On the other hand its

disclosure might have informed public debate generally. Although we do not consider there was much public interest either way, we consider that the public interest in disclosure outweighed that in maintaining the exemption.

Page 28

DCMS rightly conceded that this should be disclosed.

Page 30 (para 4)

DCMS rightly conceded that this should be disclosed.

Page 39

Same considerations apply as in relation to page 5.

Pages 48-52

This is the most directly relevant document to the request. It was Annex B to the note dated 19 November 2004 (pp 29-31) and it contains the advice that led to the adoption of the decision to introduce the limits of 8 and 8 in respect of large and small casinos announced on 16 December 2004 (see para 4 in particular). As Mr Bolt says at paragraph 67 of his statement: "It is a thorough analysis by a senior civil servant of the options for large and small casinos, with blunt advice on the pros and cons of each option including the legal risks". Given the background to the introduction of the 8-8-8 policy (not in the original Bill; no consultation), we therefore regard the public interest in disclosure of this document as very weighty.

As to the public interest in maintaining the exemption, we note again that by February 2007 the specific policy decision on numbers of large and small casinos had been made for over two years and the Act had passed in April 2005, so that the need for a

"safe space" in relation to that decision had diminished. We accept Mr Bolt's evidence at paragraph 67 of his statement and in the course of the hearing that the paper discusses some issues that remained sensitive in February 2007, in particular the question of ratios of machines to tables, and we note that there are references to legal risks. However, given the context of the paper (it was addressed to the question of introducing controls on the numbers of large and small casinos into the Gambling Bill), the tentative nature of various suggestions and the fact that the author of the paper was a senior civil servant (but not a lawyer giving legal advice), we do not think any possible harm likely to result from disclosure would have been sufficient to tip the balance of the public interest in favour of keeping the paper confidential.

Page 55 (para 16):

Same considerations as apply in relation to page 5.

Page 58B (para 11):

This paper (prepared by the head lawyer within DCMS working on gambling policy but undated) was also highly relevant to the issue of limiting numbers of small and large casinos and DCMS have disclosed most of it in the course of the appeal. The section which they seek to withhold was not directly relevant to that issue as it bears on the position of existing casinos. However, it is part of the paper and we could not see any strong basis for withholding it given that it amounts to a statement of the obvious. On balance we think neither public interest particularly strong but that that in disclosure is weightier.

Pages 63-66

This is a paper to the Secretary of State attaching a draft letter to two Cabinet committees chaired by the John Prescott, the Deputy Prime Minister, seeking clearance for the 8-8-8 policy decision. The documents are part of the Cabinet

approval process for the 8-8-8 decision and thus of some general interest, although it is right that the contents do not shed much light on the basis for the 8-8-8 decision or add greatly to the material in the public domain.

On the other hand, we have found that section 35(1)(b) applies to these documents as well as section 35(1)(a) and the convention of collective Cabinet responsibility was clearly a relevant factor in considering the public interest in maintaining confidentiality in the document; however, the documents do not disclose any disagreement between Ministers so that no actual harm would have been caused by its disclosure.

Overall, we consider that neither the public interest in disclosure nor that in maintaining the exemptions was very strong and that neither was of greater weight than the other; the consequence of that finding is that the documents ought to have been disclosed. We have reached a different view in relation to para 5 on page 64 which we think should be redacted for the reasons we set out in Annex B.

Pages 67-71

This is a draft of the Statement of National Policy which was published on 16 December 2004 (see paragraph 3 of main decision) which was itself attached to the paper at pp 63-64 dated 8 December 2004. The draft differs little from the published Statement and, in that sense, there was little public interest in its disclosure. We accept, however, that there was some public interest in the public seeing that the Statement was the product of internal government deliberation as the Commissioner submits and, given our finding that the paper to which it was attached ought to have been disclosed, we are of the view that the public interest in disclosure, although not weighty in itself, was heavier than the public interest in maintaining the section 35(1)(a) exemption, as to which no particular arguments were raised by DCMS.

Pages 82- 84

The same considerations apply as in relation to pages 63-66.

Pages 85- 89

This draft of the Statement of National Policy was attached to the email at page 82; the same considerations apply as in relation to pages 67-71.