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

**Case No. EA/2009/0108**

**ON APPEAL/APPLICATION FROM:**

**Information Commissioner's**
**Decision Notice No: FS50252539**
**Dated: 27 May 2010**

**Appellant: Christopher Lamb**

**Respondent: Information Commissioner**

**On the papers**

**Date of decision: 2 December 2010**

**Before**
**Chris Ryan**
(Judge)
and
**Gareth Jones**
**Andrew Whetnall**

**Subject matter: Prohibitions on disclosure s.44**

**IN THE FIRST-TIER TRIBUNAL** **Case No. EA/2010/0108**
**GENERAL REGULATORY CHAMBER**

# DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

## REASONS FOR DECISION

Introduction

1. We have concluded that the Information Commissioner was correct to conclude, in his Decision Notice dated 27 May 2010, that he had been entitled to refuse to disclose to the Appellant certain information that had come into existence in the course of an earlier investigation because, on a reading of section 44 of the Freedom of Information Act 2001 ("FOIA") alongside section 59 of the Data Protection Act 1998 ("DPA"), the information was the subject of an absolute exemption.

Background Facts

2. In December 2006 the Appellant made a freedom of information request to the Cabinet Office for the Minutes of the Cabinet Meetings on 7th and 17th March 2003, at which the Government of the day made its decision to participate in the invasion of Iraq. The request was refused but both the Information Commissioner and this Tribunal (then called the Information Tribunal) decided that, although the information was covered by a qualified exemption under the Freedom of Information Act 2001 ("FOIA"), the public interest in maintaining the exemption did not outweigh the public interest in disclosure. Accordingly the Cabinet Office was directed to disclose the information, subject only to the redaction of some minor elements of information. We will refer to this as the "Cabinet Minutes Case".

3. That direction was not complied with. The broad effect of FOIA section 53 is that such a direction ceases to have effect if the appropriate Cabinet Minister, issues a certificate stating that he or she has on reasonable ground formed the opinion that the public authority holding the requested information was not in breach of its disclosure obligation under FOIA section 1. Such a certificate ("the Ministerial Veto") was issued by the then Secretary of State for Justice on 23 February 2009.

4. In accordance with FOIA section 53(3) a copy of the certificate recording the Ministerial Veto was laid before each House of Parliament.

5. No attempt was made to challenge the Ministerial Veto by an application for Judicial Review. The statutory process for dealing with the December 2006 request for information has therefore been exhausted.

<u>The Request for Information and its partial refusal</u>

6. On 19 March 2009 the Appellant wrote to the Information Commissioner in the following terms:

> *"Under the terms of the Freedom of Information 2000 I request disclosure of any copy of the minutes for the Cabinet meetings on 13 and 17 March 2003 held by the Information Commissioner's Office with all background papers produced by ICO staff relating to, and pursuant to, its visit to the Cabinet Office on 19 September 2007 for the purpose of viewing the "withheld information" in situ. In particular, this request is targeted at background papers which show the processes of thought behind the Information Commissioner's conclusion that the Cabinet minutes in question should be disclosed"*

7. The Information Commissioner is, of course, one of the public authorities listed in Schedule 1 of FOIA and therefore has the same obligation as any other public authority to disclose information to those requesting it under section 1. Of course he also has the same right to rely upon any of the exemptions set out in FOIA as a ground for refusing disclosure. But if his refusal is to be challenged, the challenge must take the form of a complaint under FOIA section 50 to the very same body that issued the refusal. That is what happened in the current case after the Information Commissioner, having disclosed some information from his file, refused to disclose the remainder.

8. The basis of the refusal was FOIA section 44, which provides that information is exempt information if its disclosure is *"prohibited by or under any enactment*". In this case the Information Commissioner said that the relevant enactment having that effect was section 59 of the Data Protection Act 1998 ("DPA"). The parts of that provision that are relevant to this appeal read:

> *"(1) No person who is or has been the Commissioner…shall disclose any information which –*
> *(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of [the information Acts],*
> *(b) …*
> *(c)…*
> *unless the disclosure is made with lawful authority.*
>
> *(2)For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that-*
> *…*
> *(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.*

*(3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence."*

The Information Commissioner's Decision Notice

9. Some further information was released during the course of the Information Commissioner's investigation. But his Decision Notice issued on 27 May 2010 at the conclusion of the investigation stated that he had been entitled to refuse to disclose the following three documents ("the Disputed Information"):

   (i) Handwritten notes made by Richard Thomas, the person holding office as Information Commissioner in September 2007, on the occasion that he visited the Cabinet Office to inspect the minutes that formed the subject matter of the Cabinet Minutes Case.

   (ii) Four bullet points of handwritten notes made by a case officer within the Information Commissioner's office when discussing the case with Mr Thomas.

   (iii) A confidential annex which accompanied the Decision Notice in the Cabinet Minutes Case (and which, as a result of the Ministerial Veto, remains unpublished to this day).

10. The Information Commissioner has stated that he did not hold a copy of the minutes themselves at the time when the request was made. The Decision Notice recorded that item (i) above contained incomplete sentences, abbreviations and verbatim quotes from the minutes in Mr Thomas', partially illegible, handwriting. Item (ii) was said to consist of one bullet point summarising briefly the scope of the minutes, with the remaining three recording the Information Commissioner's arguments (but not the conclusions) on the question of disclosure. Item (iii) was said to consist of two parts, the first elaborating the analysis of the public interest test recorded in the open part of the Decision Notice and

the second setting out the information that the Information Commissioner considered should be redacted before release.

11. In his Decision Notice the Information Commissioner decided that the Disputed Information fell within DPA section 59(1) and that disclosure in response to the Appellant's request would not have been with "*lawful authority*" under that subsection because the only applicable basis for arguing to the contrary would be section 59(2)(e) and, in all the circumstances of the case, it could not be said that the disclosure would have been "*necessary in the public interest*" having regard to "*the rights and freedoms or legitimate interests of any person*".

The Appeal to the Tribunal

12. The Appellant filed an appeal from the Decision Notice on 11 June 2010. It was supported by detailed Grounds of Appeal. After a Response had been filed by the Information Commissioner directions were given for the determination of the Appeal in a paper determination, without a hearing, with each side having an opportunity to file written submissions and any evidence relied on.

13. The written materials filed with the Tribunal disclosed two issues for our determination. The first was whether the information in dispute fell within DPA section 59(1). The Information Commissioner complained that, as this had not been raised in the Grounds of Appeal but appeared for the first time in the Appellant's written submissions, it ought not to be taken into account. However, we are satisfied that, as it was considered in the Decision Notice and the Information Commissioner had an opportunity of responding to it in his own written submissions, we should determine it. The second issue was whether, there was lawful authority for disclosure, with the result that disclosure would not have been prohibited under DPA section 59, so that the Information Commissioner was not entitled to rely on the exemption set out in FOIA section 44.

14. We were not addressed on the question of whether the very existence of the Ministerial Veto would have justified a refusal to disclose any information that would have revealed any part of the Cabinet Minutes and we make no further comment on the point.

15. We will deal in turn with each of the issues identified in paragraph 13 above.

Was the Disputed Information "obtained" from the Cabinet Office

16. In his written submissions the appellant challenged whether "in a strictly accurate sense" the information in dispute had been obtained by, or furnished to, the Information Commissioner since it was *"the product and spin-off by-products of a ICO viewing of the Cabinet minutes in September 2007".* The Information Commissioner argued that if one considers the content of the three documents in question, and does not allow oneself to be led astray by their form, they clearly record information obtained from the Cabinet Office. We agree. In the case of document (i) the process of obtaining the information was direct, in that the Cabinet Office refused to provide a copy of the minutes themselves but permitted the Information Commissioner to inspect them and to take from them such information as he required, in the form of his contemporaneous note. In the case of documents (ii) and (iii) they each record parts of the same information, albeit that the connection with the originally inspected document is indirect.

17. We therefore conclude that it is correct to characterise the information in dispute as having been obtained by or furnished to the Information Commissioner so that it falls within DPA section 59(1).

Would disclosure be prohibited under DPA section 59 as lacking "lawful authority"?

18. Although a determination under section 59(2)(e) is based on a public interest test it is a very different test from the one commonly applied by the Information Commissioner and this Tribunal under FOIA section 2(2)(b), when deciding whether information should be disclosed by a public authority even though it is covered by a qualified exemption. The test there is that disclosure will be ordered unless the public interest in maintaining the exemption outweighs the public interest in disclosure. Under section 59 the information is required to be kept secret (on pain of criminal sanctions) unless the disclosure is necessary in the public interest. There is therefore an assumption in favour of non-disclosure and we are required to be satisfied that a relatively high threshold has been achieved before ordering disclosure.

19. The appellant conceded in his written submission that the threshold he had to reach was indeed a high one. But he argued that disclosure would (or at least might) throw light on a number of factors surrounding the Cabinet meetings in question, which he considered to be of great importance. These included:
    a. The different accounts that had come to light as to what happened;
    b. The suggestion that the Cabinet might not have been well informed about, for example, a meeting between the Prime Minister of the day and the head of the UN body responsible for weapons inspection regime in Iraq;
    c. Criticism that had been voiced about the style of government at the time which, it was said, had sidelined the Cabinet to some degree and undermined collective Cabinet responsibility;
    d. A suggestion that the business to be conducted at one or both of the meetings had been "choreographed" by a few of those involved resulting in further undermining of the process of Cabinet government;
    e. Doubts expressed as to whether the role of the Attorney General had become confused in the period immediately before the meetings in question;

f. Uncertainty as to how well the Cabinet had planned to meet its humanitarian responsibilities in the aftermath of the proposed invasion.

20. Each of these factors was explored in considerable detail in the Appellant's written submission and was supported by a significant body of material extracted from the various inquiries relating to the Iraq conflict, which have either taken place or are currently in progress. However, on their own they cannot have any bearing on the matter. They may or may not create a case for disclosure of the minutes of the meetings in question. But that is a question that has already been disposed of, so far as concerns the original request that gave rise to the Cabinet Minutes Case, as a result of the Ministerial Veto. The Appellant appeared to concede as much by basing his argument in favour of disclosure, not on the public interest in seeing the relevant minutes, but in being provided with information to assess how the Information Commissioner obtained and processed information during the investigation he carried out at the time and how that process affected his determination. The issues and concerns summarised in the preceding paragraph serve, therefore, only to set the background against which the Information Commissioner's actions must be assessed.

21. The Appellant's argument misses the crucial point, which is that the Information Commissioner's decision in the Cabinet Minutes Case was in favour of disclosure and that it was upheld on appeal. It is therefore very difficult to see any public interest at all in disclosing more information about the route by which he reached the very conclusion that the Appellant considers was the correct one. Nor can it be said, with any conviction, that the Appellant has a right or a legitimate interest in disclosure in those circumstances. It is no part of the freedom of information regime to provide a mechanism by which a party who prosecuted a successful complaint to the Information Commissioner in the past may have his or her winning margin

reassessed in the light of events subsequent to the date of the original victory.

22. The Information Commissioner accepted that there was a public interest in his own procedures being transparent but argued that there were strong elements of public interest against disclosure, arising from the legitimate interests of the Cabinet Office and the public as a whole. First, so far as disclosure of the Disputed Information would reveal information which both the Information Commissioner and the Tribunal decided in the Cabinet Minutes Case should be redacted, there is clearly a particularly strong public interest in maintaining secrecy. Secondly, so far as disclosure would reveal the content of the minutes covered by the Cabinet Minutes Case, there is an equally strong public interest in the Ministerial Veto not being undermined and in the freedom of information regime not being used to reopen an issue that, in the absence of an application for judicial review at the time, was brought to an end by the publication of the Ministerial Veto in February 2009. Thirdly, disclosure would discourage future co-operation by public authorities in the Information Commissioner's investigations.

23. The language of DPA section 59(2)(e) suggests that circumstances are capable of arising in which disclosure of materials provided to the Information Commissioner during an investigation would become necessary in the public interest. We need not speculate what those circumstances might be. It is sufficient for the purposes of this decision for us to say that they do not arise on the facts of this case. It is difficult to determine any public interest in disclosure, for the reasons we have given, let alone any of such magnitude that could be said to render disclosure "necessary". And against that the public interest in maintaining confidentially is considerable.

24. We therefore conclude that the Information Commissioner would not have lawful authority to make the disclosure that the Appellant seeks and that to comply with the request in respect of the Disputed

Information in response to the information request would have been prohibited under DPA section 59(1). Accordingly the absolute exemption under FOIA section 44 applies and the Information Commissioner was right to conclude in his Decision Notice that he did not breach his obligations under FOIA section 1 when refusing to disclose the Disputed Information.

25. Our decision is unanimous.

26. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission 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 the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed:

**Chris Ryan**
Tribunal Judge
2 December 2010

**IN THE FIRST-TIER TRIBUNAL** **Case No. EA/2010/0108**
**GENERAL REGULATORY CHAMBER**
**[INFORMATION RIGHTS]**

**ON APPEAL FROM:**

**Information Commissioner's**
**Decision Notice No: FS50252539**
**Dated: 9 February 2010**

## Appellant: CHRISTOPHER LAMB

## Respondent: THE INFORMATION COMMISSIONER

# Ruling on Application for Permission to Appeal.

1. On 2 December 2010 the Tribunal promulgated its decision on this Appeal ("the ICO Decision") in which it concluded that the Information Commissioner's Decision Notice dated 27 May 2010, had been correct. He had concluded that, in his capacity as a public authority falling within the scope of the Freedom of Information Act 2000 ("FOIA"), he had been entitled to refuse to disclose to the Appellant certain information that had come into existence in the course of an earlier investigation.
2. The justification for refusal had been section 44 of the ("FOIA"), which provides that information is exempt information if its disclosure is *"prohibited by or under any enactment*". The Information Commissioner had decided that the enactment that imposed that prohibition was section 59 of the Data Protection Act 1998 ("DPA"). It reads, in relevant part, as follows:

*"(1) No person who is or has been the Commissioner…shall disclose any information which –*
*(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of [the information Acts],*
*(b) …*
*(c)…*
*unless the disclosure is made with lawful authority.*

*(2)For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that-*
*…*

*(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.*

*(3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence."*

3. In the ICO Decision the Tribunal concluded that:
   a. The information in question fell within the scope of DPA section 59 as information obtained by him in the course of an investigation under FOIA.
   b. The effect of section 59 was to create an assumption in favour of non-disclosure, which would only be overridden if the public interest test set out in subsection 2(e) was satisfied.
   c. On the facts the public interest test was not satisfied.
4. The earlier investigation referred to in paragraph 1 concerned a request by the Appellant addressed to the Cabinet Office seeking disclosure of the minutes of the Cabinet Meetings in March 2003 at which a decision had been reached to invade Iraq. At the end of the investigation the Information Commissioner had ordered disclosure and, on appeal, the Tribunal (then called the Information Tribunal) had agreed with his conclusion. However, on 23 February 2009 the then Secretary of State for Justice had issued a ministerial veto under FOIA section 53 effectively overruling the Tribunal's decision. This is referred to as "the Cabinet Minutes Case".
5. On 19 March 2009 the Appellant approached the broad subject matter of the Cabinet Minutes Case by addressing a new information request to the Information Commissioner requesting disclosure of any copy of the minutes which he had retained from the earlier investigation together with *"all background papers produced by ICO staff relating to, and pursuant to, its visit to the Cabinet Office on 19 September 2007 for the purpose of viewing the "withheld information" in situ."* This led, ultimately, to the ICO Decision summarised in paragraphs 1 - 3 above.
6. On 21 December 2010 the Appellant made a written application to the Tribunal for permission to appeal the ICO Decision. His written reasons for applying for permission to appeal did not challenge the parts of the decision summarised in 3 a. and 3 b. above but focussed entirely on whether it had been right to conclude that "*having regard to the rights and freedoms or legitimate interests of any person",* disclosure had not been "*necessary in the public interest".*
7. The right to appeal arises out of section 11 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"). That section provides that any party to a

decision of a First Tier Tribunal has a right of appeal to the Upper Tribunal on any point of law but that the right may only be exercised with permission. Under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules") permission to appeal must be sought from the relevant First-tier Tribunal.

8. The application for permission to appeal in this case satisfied the formal requirements set out in rule 42 of the Rules in respect of both its contents and the time limit for its submission.

9. Rule 43(1) requires the Tribunal, on receiving an application for permission to appeal that satisfies those requirements, to consider first whether to review the decision in accordance with Rule 44. That rule provides, in relevant part, as follows:

*"(1) The Tribunal may only undertake a review of a decision –*
*(a) pursuant to rule 43(1)….; and*
*(b) if it is satisfied that there was an error of law in the decision"*

10. I am satisfied that there was no error of law in the Decision. In reaching that conclusion I have satisfied myself that:
    a. The procedures adopted by the Tribunal gave the parties adequate opportunity to present their evidence and arguments and included an opportunity to apply to vary the procedural directions if they thought that this was not the case.
    b. The Tribunal's reasons for reaching its conclusion were adequately and intelligibly recorded in the Decision.
    c. There was no dispute between the parties as to the law which the Tribunal was required to apply, namely FOIA section 44, by reference to DPA section 59.
    d. The Tribunal interpreted the relevant provisions correctly, taking account of the submissions it had received from the parties.
    e. The facts relevant to the case were apparent from the materials presented to the Tribunal (including the circumstances in which the earlier appeal brought by the Appellant in the Cabinet Minutes Case had succeeded, but had been overridden by a ministerial veto under FOIA section 53) such that there was no error of law in reaching a conclusion that was not supported by evidence;

11. I have also satisfied myself that the Tribunal's application of the evidence to the law was rational and it was justified in concluding that the Information Commissioner would not have had lawful authority to disclose the withheld information, with the result that its disclosure was prohibited under DPA section 59. I reach that conclusion notwithstanding the assertion, in the Appellant's written reasons for applying for permission to appeal, that the Tribunal had omitted a key argument in favour of disclosure. This was that the UK Government was *"potentially in violation of the International Law and the Treaty of Obligations of the UN Charter"* and that decisions had been taken that had not been *"referred to Cabinet collective deliberation".* He sought support from criticisms of the Government's legal justification of the Iraq invasion voiced by the late Lord Bingham and various witnesses to the Chilcott Enquiry and requested a re-assessment of the section 59 public interest test. He added:

> *"My understanding is that pertinent to this test is whether the information involved could prove useful in the prevention or detection of an unlawful act. Other considerations such as whether the information could reveal dishonesty, malpractice, serious incompetence, seriously improper conduct or mismanagement on the part of executive decision-making should also enter into the test (as I understand it)"*

12. The Tribunal took note, in paragraph 19 of the ICO Decision, of a number of public interest factors put forward by the Appellant in favour of disclosure. They included issues concerning the style of cabinet government at the relevant time and the suggestion that the role of the Attorney General had become confused during the period immediately prior to the decision to support the invasion. However, the Tribunal went on to say that those issues:

> *"may or may not create a case for disclosure of the minutes of the [Cabinet] meetings in question. But that is a question that has already been disposed of, so far as concerns the original request that gave rise to the Cabinet Minutes Case, as a result of the Ministerial Veto. The Appellant appeared to concede as much by basing his argument in favour of disclosure, not on the public interest in seeing the relevant minutes, but in being provided with information to assess how the Information Commissioner obtained and processed information during the investigation he carried out at the time and how that process affected his determination."*

13. I do not believe that the Tribunal committed any error in either identifying the relevant public interest in that way or in then concluding that it did not justify disclosure. The additional points raised in the reasons for applying for permission to appeal are closely related to those identified in the ICO Decision (if they were not then a question would arise as to whether they should be taken into consideration at all at this stage) and do not undermine the reasons the Tribunal gave for deciding that, viewed overall, the public interest test factors were in favour of refusing disclosure.
14. Because my decision not to review is based on my conclusion that there was no error of law in the Decision it follows that the Appellant does not have ground for appealing under section 11. Accordingly, pursuant to rule 43(2), I also refuse his application for leave to appeal.
15. Under Rule 23(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, the Appellant has one month from the date of this Ruling is sent to him to lodge an application for permission to appeal directly with the Upper Tribunal by sending it to:

The Upper Tribunal (Administrative Appeals Chamber)
5th Floor, Chichester Rents
81 Chancery Lane
London WC2A 1DD
DX: 0012 London/Chancery Lane

Further information can be found at:
www.administrativeappeals.tribunals.gov.uk.

Signed: Dated: 18 January 2011

Chris Ryan
Tribunal Judge