Freedom of Information Act 2000 (Section 50)

Decision Notice

23 March 2009

Public Authority: Home Office
Address: Seacole Building
2 Marsham Street
London
SW1P 4DF

Summary

The complainant sought access to information held by the public authority regarding the provisions of Indian nationality law as it applied to minors of Indian origin. Information dated between 1 January 2005 and 6 June 2005 was sought. The public authority withheld the information, citing the exemption provided by section 35(1)(a) (formulation and development of government policy). The Commissioner is satisfied that the exemption is engaged and concludes that the public interest favours the maintenance of the exemption. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of the Act in that it did not issue a valid refusal notice within 20 working days of receipt of the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 11 April 2005 the complainant made a request for information as follows:

'I would like to be provided a copy of all records held by the Home Office IND pertaining to the provisions of Indian nationality law as applied to minors of Indian origin. My request is restricted to Home Office IND records dated between 1 January 2005 and 10 April 2005.

Records requested include, but are not limited to:

i. Home office memoranda
ii. Relevant emails and
iii. Any records/communications (or notes/minutes of such communications) to/from the Government of India, or its representatives.'

3. On 6 June 2005 the complainant made a second request for information. The wording was identical to the first request, apart from the date, which was for records from 11 April 2005 to 6 June 2005.

4. These two requests were responded to on 14 June 2005. The complainant was provided with a copy of a Note Verbale[1], which had been sent to the Indian authorities on 20 April 2005. The public authority confirmed that they held other information, but that the exemption contained in Section 35(1)(a) of the Freedom of Information Act 2000 was being relied on to withhold this information from release. In their refusal notice the public authority stated that '*the information being exempted here clearly falls into this category because….we are still developing our policy on this matter with the Indian government'.*

5. Public interest arguments were also provided by the public authority. Arguments for disclosure were outlined as:

- Greater transparency will enhance knowledge of the way policy is developed
- Public contribution to the policy discussions could become more effective as more information is disclosed
- There is a public interest in being able to assess the quality of advice being given to Home Office Ministers by their officials in this sphere of immigration policy and any subsequent decision making which arises from that advice.

6. Public interest arguments put forward for maintaining the exemption were:

- Ministers and officials need to be able to conduct rigorous and candid risk assessments of the policy in question, including consideration of the reasons for and against developing policies;
- Premature public disclosure of the public authority's thinking in this area at this stage might close off better options for the Department in the future;
- That both Ministers and Home Office officials need room to develop this policy, without fear that the policies may be held up to ridicule while they are being formulated;
- Disclosure at this stage would harm the policy making process for Home Office officials in future when developing policies in this area as they could

[1] A Note Verbale is an unsigned diplomatic note, similar to a memoranda and which is written in the third person.

come under pressure not to challenge ideas in the formulation of policy, and this could lead in the longer term to poorer decision making

7. The public authority concluded that '*the balance of the public interests identified lies in favour of maintaining the exemption as there is a greater overall public interest in preventing release of this information into the public domain to ensure that both Ministers and officials from IND have the necessary space to continue to formulate the policy concerned'.*

8. The complainant requested an internal review of this decision on 27 June 2005. In his request he made the following submissions:

- That the matter at hand did not relate purely to the formulation of government policy as an existing policy on this matter had been in place since 1998;

- Since then, there had been no relevant changes or updates to law or regulations in the UK or in India to warrant a reformulation of the policy on how to interpret Indian citizenship law in effect on 4 February 1997, other than for rectifying official error in formulating the prevailing policy in the first place;

- If there are serious doubts or views that official error may have contributed to formulating prevailing policy, then it is in the public interest to disclose.

9. Additional public interest arguments were made in favour of disclosing the information:

- The information would expose error or wrongdoing on the part of the government;

- The information would expose that the Home Office policy in place between 1997 to date (i.e the existing policy, not a policy being formulated) was based on an incorrect reading of Indian citizenship legislation, or that serious doubts exist about the reading of Indian citizenship legislation on which it was based;

- The information would expose that British citizenship applications, that may have been refused unlawfully, can be promptly and expeditiously rectified in light of specific and credible information which the Home Office has before it;

- It is in the public interest that the laws of the United Kingdom expressed in the provisions of the British Nationality (Hong Kong) Act 1997 be properly implemented and that instances of official error be identified and rectified to the affected British nationals.

10. The internal review response was dated 19 August 2005. That review concluded that the original decision was correct. Regarding whether the information related to an existing policy or the formulation and development of government policy the

review stated: '*this exemption applies both to the formulation and development of government policy and I am therefore satisfied that it falls within this exemption.'*

11. The review also reconsidered the public interest arguments and concluded that '*the original response successfully argues that the potential harm to the public good in this information being released outweighs any public gain'.*

The Investigation

Scope of the case

12. On 19 September 2005, the complainant contacted the Commissioner to complain about the way his request for information had been handled by the public authority. The complainant specifically asked the Commissioner to consider the following points:

    i. The Section 35 exemption is not absolute and is subject to a public interest test;

    ii The matter at hand does not relate to the development and formulation of government policy but relates to prevailing policy which has been in place since 1998. In this regard the complainant sought to highlight that:

    - In order to judge whether individuals qualified for British citizenship[2], it has been necessary for the British Government to interpret Indian citizenship legislation to determine if a person is/was a citizen of India[3];

    - An existing policy about this has been in place since 1998, which purports to be based on the outcome of lengthy and detailed discussions with the Government of India in 1997/1998. Since then, there have been no relevant changes or updates to law or regulations (in the UK or India) which would warrant a reformulation or development of the policy on interpreting Indian citizenship laws, other than for rectifying official error in formulating the existing policy;

    - It would be in the public interest to disclose if there were doubts about the reading of the Indian citizenship laws or views that official error may have contributed to formulating the prevailing policy.

13. The complainant also asked the Commissioner to take into account his public interest arguments in favour of disclosure. His arguments were similar to those made in support of his request for internal review, with some additions:

    - The information would expose error or wrongdoing on the part of the government;

2.Under the provisions of the Hong Kong (British Nationality Order 1986 and the British Nationality (Hong Kong) Act 1997.

[3] Immediately before 4 February 1997 or 1 July 1997.

- The information would expose that the Home Office policy formulated in 1997/1998 on how to interpret Indian Nationality law as in place on 4 February 1997 or 30 June 1997 was based on an incorrect reading of Indian citizenship legislation, or that legitimate doubts exist about the reading of Indian citizenship legislation on which it was based;

- The information would expose that the Indian authorities were inadequately informed that British National (Overseas) citizenship could be acquired solely by making a written application for registration during the discussions in 1997/98 which would vitiate any statements that they made because of their misunderstanding of how British National (Overseas) citizenship was granted;

- The information would expose that British citizenship applications, may have been refused unlawfully or improperly as a result of official error;

- That those British citizenship applications which may have been refused unlawfully or improperly can be promptly and expeditiously rectified in light of specific and credible information which the Home Office possesses;

- Whether it is in the public interest that the laws of the United Kingdom expressed in the provisions of the British Nationality (Hong Kong) Act 1997 be properly implemented and that instances of official error be identified and promptly rectified to minimize hardship to the affected British nationals.

14. The complainant asked the Commissioner to take into account other statements made by the public authority about Indian citizenship law contained in a letter to him from the public authority. The letter has another Freedom of Information request number on it and is addressed to the complainant. In that letter the public authority stated:

'*We are satisfied that as a result of these discussions [In 1997/98] we have a sound understanding of Indian citizenship law'* and that they were *'satisfied that our current understanding of Indian citizenship law (which is the result of previous lengthy discussions [in 1997/98] with the Indian government) is correct.'*

Notwithstanding the fact that these comments were made in relation to a separate Freedom of Information application, the Commissioner has considered these comments.

15. The complainant submitted that it was irrational and devoid of logic for the Home Office to maintain on the one hand that they have a sound understanding of Indian citizenship law that has been in place since 1998 and their position is correct; and on the other to rely on the Section 35(1)(a) exemption when the information sought is dated more than 6 years after the relevant policy was in place. Because of this contradictory position, the complainant submitted that it was in the public interest to disclose.

Chronology

16. A case worker of the Commissioner contacted the public authority on 23 April 2007, requesting them to send a copy of the disputed information to the ICO for consideration and assessment. The ICO also asked the public authority whether they would now consider voluntarily releasing any of the information given the passage of time.

17. On 23 April 2007 a case worker of the Commissioner undertook background research into the granting of British citizenship to minors of Indian origin born in Hong Kong. Those investigations discovered that there was a policy change announced in early 2006 by the British government which had led to an announcement that they would reconsider applications for citizenship which had previously been refused[4]. Information which was in the public domain about the issue included Hansard records from the House of Lords; copies of memoranda between Lord Avebury and the public authority and references to an April 2005 Note Verbale from the Government of India being available in the House of Lords library.

18. The complainant was written to on 24 April 2007. In that letter the caseworker asked the complainant to confirm that he still sought access to the information sought in the request in light of the developments which had occurred in the meantime.

19. The complainant contacted the caseworker on 11 May 2007. The complainant advised that he sought to pursue his complaint about the handling of his information request. He agreed that there had been a policy change in early 2006, however he was still of the opinion that the Home Office had misapplied the public interest test at the time of his request and he felt the information should have been disclosed.

20. The public authority wrote to the ICO on 18 May 2007 enclosing the withheld information. Additional information covered by the request for information was provided for consideration on 5 June 2007 and 8 June 2007. The Home Office advised that they were willing for these pieces of information to be released to the complainant, however they maintained their position that the remainder of the information should not be released under section 35 and that the public interest test carried out in response to Mr Ebrahim's request remained valid. The Home Office also advised that the complainant was provided with a copy of the eventual response from the Indian Government to the Note Verbale. This was provided after the date of the internal review.

Findings of fact

21. A British National (Overseas) (BNO) is a person who was formerly a British Dependent Territories Citizen (BDTC) and who acquired that citizenship through a connection with Hong Kong. BDTC's were able to register as BNO's before

[4] It was estimated that around 600 applications from BNO minors of Indian origin, whose applications had been refused as they had a parent with Indian citizenship, would be reconsidered. Source: letter to the South China Morning Post on 4 July 2006 by the complainant and Lord Avebury.

Hong Kong reverted to Chinese sovereignty on 1 July 1997. It is no longer possible to acquire this status and it is not transmissible.

22. A British Overseas Citizen (BOC) is a person born before 1 January 1983 who originally acquired British nationality through a connection with a former colony which has since become independent. In this case, they are people who did not qualify for Chinese nationality, because they lacked an ancestral link. The status is not transmissible and can only be acquired after 31 December 1982 by the children of BOC's or BNO's who would otherwise be stateless.

23. During the period when Hong Kong was a British colony, considerable numbers of Indian citizens and/or people of Indian origin settled there. Upon the transfer of sovereignty to China in 1997, the citizenship status of these people was unclear. They were not eligible for Chinese citizenship as they lacked an ancestral link to China. Citizenship options for this community lay with either the Indian or British governments, or both, depending on the personal circumstances of the individual.

24. Before 1 July 1997 all residents of Hong Kong were eligible to be a BDTC. Post 1 July 1997, this status changed to being a BNO. As BNO status is not transmissible to future generations, the post 1982 Hong Kong born children of people of Indian origin (who had been resident in Hong Kong pre 1 July 1997) were only eligible to be registered as a BOC if they would otherwise have been stateless.

25. In order to be satisfied that a person was stateless and therefore eligible to be a BOC, the British authorities had to be satisfied that the person was not eligible for Indian citizenship. The Home Office was therefore required to have an opinion about Indian citizenship law, and talks were undertaken between the British and Indian authorities in 1997 and 1998 on this topic. As a result of these talks the British government formulated a policy to deal with applications for BNO status, which was based on the information obtained during these talks.

26. Submissions were made to the British Government in subsequent years, by the complainant and others, which suggested that the British interpretation of Indian citizenship laws was not correct, and that as a result there were children of Indian origin in Hong Kong who were effectively stateless.

27. In addition, some Indian citizenship laws were amended in 2003. These amendments appeared to alter the process of transmission of citizenship for children who were eligible for Indian citizenship by descent and created a new category of citizenship, that of Overseas Indian Citizen.

28. In April 2005 a Note Verbale was sent by the British Government to the Indian Government, seeking clarification about certain aspects of Indian citizenship law. The final draft of the Note Verbale is in the public domain.

29. A response to this Note Verbale was received at the start of 2006. The information provided in the response impacted on the application of British nationality law and led to a change in policy regarding its application. The effect of this was that a number of individuals who had previously been assumed to be

dual British/Indian nationals would now be considered to hold British nationality alone. When announced, the public authority stressed that there was no change to the British Nationality (Hong Kong) Act 1997, but rather that this would lead to a revision of some applications which had been refused on the basis that the applicant was considered a dual citizen; and that fresh applications would be considered in light of the information which had been provided.

Analysis

Procedural Matters

Section 10 / Section 17

30. The information request was made initially on 11 April 2005, with a supplementary request made on 6 June 2005. The response to these requests was dated 14 June 2005. Whilst this was within the 20 working day time limit specified by section 10(1) for the second request, it was outside this time period for the first request.

31. In failing to confirm or deny whether the requested information was held within 20 working days of receipt of the first request, the public authority did not comply with the requirement of section 10(1). In failing to provide a refusal notice specifying which exemption was cited and why this was believed to be engaged within 20 working days of receipt of the request, the public authority did not comply with the requirement of section 17(1).

Exemptions

Section 35

Formulation or development of government policy?

32. The complainant has questioned whether the information in question relates to the development and formulation of government policy, or whether it relates to a prevailing policy which had been in place since 1998. The complainant also submits that since the policy was put into place, there have been no relevant changes or updates to laws or regulations in either the UK or India to warrant a reformulation or development of the government policy on how to interpret Indian citizenship law in effect in 1997.

33. The Commissioner agrees that no pertinent British laws or regulations were changed in the period 1997 to 2005 regarding citizenship for BNOs or BOCs. However Section 35(1)(a) does not refer to laws or regulations; it refers to policy and does not specify what kind of policy. The approach of the Commissioner to this exemption is that it covers all forms of formulation or development of policy. The Commissioner also believes that the process of developing a policy can continue in relation to a policy enshrined in statute where an existing policy is developed to incorporate improvements.

34. The Home Office reviewed its policies concerning the application of the British Nationality (Hong Kong) Act 1997 as it applied to children of Indian origin in Hong Kong during the period 1 January to 6 June 2005, with a view to reformulating them if this was required. In response to updated information provided to the British Government by the Indian Government about Indian citizenship laws, a new policy towards applications for citizenship made by Hong Kong residents of Indian origin was developed. This new policy was implemented in 2006. The Commissioner accepts that this process constitutes development of policy valid for the purposes of section 35(1)(a).

35. The next step is to consider whether the information in question relates to this policy development process sufficiently closely for it to engage the exemption. The approach of the Commissioner is that the term 'relates to' as it is used in this exemption can safely be interpreted broadly. This is based on the approach taken by the Information Tribunal in the case DfES v the Information Commissioner & the Evening Standard, in which the tribunal stated:

"If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable." paragraph 58

In this case the tribunal also stated:

"immediate background to policy discussions is itself information caught by s35(1)(a)…" paragraph 55

36. The information falling within the scope of the case consists of exchanges internal to the government and communiqués with the Indian Government about the issues of nationality that gave rise to the amended policy introduced in 2006. The Commissioner is satisfied that this information does relate to the development of government policy according to the approach taken to this exemption by the Information Tribunal. Whilst some of this information could be characterised as background to this policy development rather than recording the actual policy development process itself, the tribunal has been clear that background information to policy discussions can also be caught by section 35(1)(a).

37. On the basis that the process of developing an amended policy concerning the application of the British Nationality (Hong Kong) Act 1997 to children of Indian origin constitutes the development of government policy and that the information in question can reasonably be characterised as relating to this policy development process, the Commissioner concludes that the exemption is engaged. Having reached this conclusion, it is necessary to go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest

38. The Commissioner has approached his consideration of the public interest arguments in this case by looking at the 11 guiding principles for section 35(1)(a) which were laid out in the Information Tribunal decision of the Department for Education and Skills (DfES) vs the Information Commissioner and the Evening Standard (EA/2006/0006).

39. The Commissioner has also considered the arguments put forward by the complainant and the public authority, and has incorporated them into his consideration of the following principles where he deemed it to be appropriate.

40. i. The information itself:

'The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case'. [5]

41. This comment from the DfES case was commended as a statement of principle by Mr Justice Mitting in the High Court decision *Export Credits Guarantee Department v Friends of the Earth.*

42. The withheld information includes communications between civil servants, Ministers, members of the House of Lords and the Indian Government. The material discusses issues surrounding existing policy and seeks updated and additional information in order to assess whether the existing policy should be amended.

43. The Commissioner believes that the nature and context of this information adds weight to the public interest in disclosure. As noted above, the process covered in the information lead to the development of a new government policy. Whilst this policy directly impacted on a relatively small number of people, the context here is that an admission was made that the government appears to have erred when following the previous policy in refusing citizenship applications.

44. As noted, this change in policy impacted directly on a relatively few people and there is little evidence of a wider interest taken in this issue around the time of the request, through media coverage for example. However, whilst only a relatively few people were directly impacted upon by the change in policy, the level of the impact of this policy change on those few people is relevant to the balance of the public interest. This impact could take the form of a change to the citizenship options available to some individuals and would, therefore, constitute an impact of considerable significance to those individuals.

45. The Commissioner believes that the public interest in disclosure of information that would add to public knowledge of why the public authority retracted and replaced an existing policy, in addition to the universal public interest in favour of

[5] Paragraph 75 (i); DfES v Information Commissioner EA/2006/0006

disclosure of information that relates to the development of government policy, is strong. Whilst only a relatively few people were impacted on by this change in policy, the level of this impact to these people was of considerable significance. The Commissioner does not, therefore, believe that the significance of this factor in favour of disclosure is reduced due to it impacting directly only on a relatively few people.

46. ii. Status of information not relevant:

"No information within Section 35(1)(a) is exempt from the duty of disclosure simply on account of its status or its classification as minutes or advice to a minister, nor because of the seniority of those whose actions are recorded. To treat such status as automatically conferring an exemption would be tantamount to inventing within s35(1) a class of absolutely exempt information" paragraph 69 DfES vs IC and the Evening Standard

47. The Information Tribunal commented further on the suggestion that there is a particular importance attached to exempting from disclosure information that falls within the class specified in section 35(1)(a) in the case DWP v the Information Commissioner (EA/2006/0040). In that case the DWP argued that:

"[section 35(1)(a)] *was an exemption of particular importance…[and that] greater weight should be attached to the public interests in favour of maintaining the exemption in order to protect Government space for deliberation on policy"*.

The Tribunal rejected this argument.

48. The High Court has also considered this issue and endorsed the above approach in the case *OGC v The Information Commissioner.* It commented at para 79 that:

"I do not think that section 35 creates a presumption of a public interest in non-disclosure. It is true that section 2 refers to 'the public interest in maintaining the exemption', which suggests that there is a public interest in retaining the confidentiality of all information within the scope of the exemption. However, section 35 is in very wide terms, and interpreted literally it covers information that cannot possibly be confidential. For example, a report of the Law Commission being considered by the Government with a view to deciding whether to implement its proposals would be or include information relating to 'the formulation or development of government policy', yet there could be no public interest in its non-disclosure. It would therefore be unreasonable to attribute to Parliament an intention to create a presumption of a public interest against disclosure. I therefore agree with the view expressed by the Information Tribunal in The Department for Education and Skills v the Information Commissioner and the Evening Standard "

49. That the information includes contributions from Ministers and members of the House of Lords is not, therefore, a valid argument in favour of the maintenance of the exemption. Neither does the conclusion above that the information falls within the class described in section 35(1)(a) suggest that the starting point when

considering the balance of the public interest is that the public interest favours maintenance of the exemption.

50. iii. Protection for Civil Servants not politicians:

There is a public interest in maintaining the exemption provided by Section 35(1)(a) in order to protect civil servants from compromise or unjust public criticism, not ministers. In the DfES case, it was not deemed to be unfair to expose an elected politician to challenge, after the event, for having rejected a possible policy option in favour of another policy which is alleged to have failed.

51. The information in question here includes contributions from both politicians and officials. Any argument that the public interest favours maintenance of the exemption in relation to information that identifies officials within the public authority must be relevant to section 35(1)(a). If, for example, the argument was made that to disclose information identifying officials would be unfair to those officials, this would be relevant to section 40(2), rather than to section 35(1)(a).

52. An argument valid to section 35(1)(a) would focus on the risk to the role and integrity of the civil service that may result through disclosure. The Commissioner is aware of the following three arguments that have been made in this area in other cases and will consider these arguments here:

53. - Public identification of civil servants with policies

The argument here is that if information were to be released that identified individual civil servants with policies this would undermine the impartiality and neutrality of the civil service. Co-operation and engagement between civil servants and ministers would be lost and the integrity of the civil service would thus be compromised, leading to poorer quality advice and decision making.

54. The Tribunal's response to this argument was given at paragraph 75 of the DfES decision, where it said:

"we are entitled to expects of our politicians…. a substantial measure of political sophistication and, of course, fair-mindedness. To reject or remove a senior official because he or she is identified …..with a policy which has now lost favour…. would plainly betray a serious misunderstanding of the way the executive should work. It would, moreover, be wholly unjust. We should therefore proceed on the assumption that ministers will behave reasonably and fairly towards officials…"

55. The Commissioner's position is that whilst he would accept that the consequences set out above would compromise the effectiveness and neutrality of the civil service if they were to occur, he agrees with the Tribunal's position that the standards that we should realistically be able to expect from both officials and politicians should limit this effect. Arguments in this area will only carry weight where they are convincing and specific to the information in question. In this case, the public authority has made no such argument. Whilst the information in question does record input from officials, in the absence of arguments specific to

this information that suggest that its disclosure would undermine the role and integrity of the civil service, this is not a factor in favour of maintenance of the exemption to which the Commissioner has given weight.

56. - Increased use of special advisers; “sofa government” or “government by cabal”

In broad terms the phrase ‘sofa government’ or ‘government by cabal’ refers to a reliance on political advisers appointed directly by politicians for advice rather than the professional, politically neutral, civil service (the term was used in the Butler Report on the Intelligence on the Weapons of Mass Destruction). The suggestion is that if the advice from, or discussions of, civil servants are disclosed, then politicians will react by seeking advice from other sources or adopting other less formal mechanisms for decision making, thus undermining the role of the civil service.

57. In the DfES case the Tribunal did not completely dismiss this point. It concluded that ‘sofa government‘ will occur with or without FOI disclosures, but left open the question as to whether such disclosures will “accelerate” the use of political advisors rather than civil servants.

58. The Commissioner will take this into account when considering arguments in this area; the increased use of political advisors was already evident prior to the introduction of FOIA, so it is only any additional effect resulting from disclosure under FOIA that will be relevant. If a public authority is able to make convincing arguments that such an additional effect (or acceleration) would result from the disclosure in question then this may be taken into account.

59. In this case the public authority has made no such argument. The Commissioner also notes that the use of special advisors from outside the civil service appears less likely to be a possibility in this case, where the policy in question focuses on the fine detail of already existing legislation, rather than being a record of the conceptual stages of a new policy, developed with achieving a political advantage as amongst its aims. The Commissioner does not believe that there is a valid public interest argument in favour of maintenance of the exemption on the basis that disclosure would be likely to cause an acceleration in “sofa government” or “government by cabal”.

60. - Accountability seen to pass from minister to official

This factor is relevant to section 35(1)(a) to the extent to which the role and integrity of the civil service would be undermined by accountability for government policy and political decisions being seen as passing from minister to official. Whilst fairness to the individual civil servant may be relevant from a section 40 FOIA or DPA perspective, the focus here is the public interest in maintaining the constitutional position that Ministers rather than civil servants are accountable to Parliament for Government Policy or political decisions. The impact of this would be that if civil servants rather than ministers become seen to be accountable for government policy or political decisions then the political neutrality of the civil service and the constitutional position of ministerial

accountability are undermined, leading to a less effective policy making or decision making process.

61. Again, the public authority has not made representations on this specific point, convincing or otherwise. Overall it appears that the concern of the public authority about releasing information from which officials could be identified related more closely to section 40(2) than to section 35(1)(a). As the public authority has not suggested that disclosure of the information in question here could lead to accountability being seen to pass from minister to official, this has not been given weight as a public interest factor in favour of maintenance of the exemption.

62. - Protecting the convention of collective Cabinet responsibility

Whilst it is not unfair to politicians to release information that allow their policy decisions to be challenged after the event, there is a public interest in preserving the convention of collective cabinet responsibility. This would be in order to allow the cabinet to discuss issues in a free and frank manner in order to improve the decision making process. Disclosure of information showing that ministers had voiced individual disagreement for policies at the discussion stage may discourage thorough Cabinet discussion and may lead to time being spent justifying individual ministerial views that were never government policy.

63. Having reviewed the information in question here, the Commissioner does not believe that disclosure would be likely to threaten the convention of collective Cabinet responsibility. Whilst a government minister is identified within the information and his agreement to the content of the Note Verbale sent to the Indian Government provides an insight into his views on the area covered within the information, the information does not reflect any debate between ministers, either within Cabinet or elsewhere. Neither does this information include any mention of a Minister having held a view that differed from government policy. The Commissioner does not consider, therefore, that the protection of the maintenance of collective Cabinet responsibility carries weight as a factor in favour of maintenance of the exemption.

64. iv. Timing:

"The timing of the request is of paramount importance…disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government." (paragraph 75, DfES vs the Information Commissioner and the Evening Standard (EA/2006/0006))

65. At the time of the request the policy was being developed. The complainant may argue, however, that the wrongdoing in the example given above is directly relevant here as he may contend that the government misinterpreted the Indian legislation initially and that this constitutes wrongdoing.

66. Whether or not the government did misinterpret the Indian legislation initially, the Commissioner does not believe that this would constitute wrongdoing in the sense meant by the Information Tribunal in the quote above. Instead such a

misinterpretation, had it taken place, would have been an error made in good faith.

67. There is, however, an argument that disclosure would be in the public interest where this would help explain and inform about the change in the policy of the government. The content of the information in question would provide background to the government policy in question. This public interest factor is valid where disclosure provides background to an error made in good faith, not only where disclosure would provide background to wrongdoing within government of the kind referred to by the Information Tribunal.

68. That the policy was being developed at the time of the request adds weight to the public interest in favour of maintenance of the exemption. The Commissioner has given significant weight to the need to protect the safe space to develop policy, in this case. This is supported by the Tribunal's decision in DfES vs the Information Commissioner and the Evening Standard (EA/2006/0006): "*Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy*" (para 75, point iv).

69. v. When is policy formulation or development complete?

This will be a question of fact in every case. In the DfES case, it was deemed that when there is a parliamentary statement announcing the policy this will normally mark the end of the process of formulation. Any public interest in maintaining the exemption does not disappear as soon as such a statement is made however.

70. The Commissioner considers that the end of the policy development process in question here occurred when the government announced the new policy regarding the reconsideration of BOC applications from previously assumed Indian dual citizens in early 2006. When the information request was made, therefore, the policy development process was ongoing.

71. vi. Information in the public domain:

At the time of the request there was information in the public domain about the general issue of the nationality options available to ethnic minorities in Hong Kong. As to whether there was information in the public domain at that time that could be accurately characterised as relating to the information requested by the complainant, whilst it is difficult to be entirely clear on what information may have been available in the public domain at the time of the request, it appears unlikely that information closely related to that which was the focus of the complainant's request was in the public domain at the time of the request. This is not a factor of relevance to the public interest, therefore.

72. vii. The robustness of officials:

In judging the likely consequences of disclosure on officials' future conduct, the DfES case held that:

"we are entitled to expect of them the courage and independence that [is] *the hallmark of our civil service… These are highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions."* (paragraph 75)

73. Central to where the balance of the public interest lies here is whether disclosure would be likely to result in a 'chilling effect'. The Information Tribunal in Scotland Office v the Information Commissioner (EA/2007/0070) defined 'chilling effect' as *"the risk to candour and boldness in the giving of advice which the threat of future disclosure would cause"*.

74. The term 'chilling effect' in relation to section 35(1)(a) can cover a number of related scenarios, which argue a progressively wider impact on frankness and candour. In this case the argument is made in the narrowest sense; the idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties make future contributions to that particular policy debate. This argument is relevant here as the policy development process in question was ongoing at the time of the request.

75. Where a chilling effect argument is made in relation to the frankness and candour of participants in an ongoing policy development process, the Commissioner will generally give this argument some weight. In this case, the Commissioner accepts that the possibility of a reduction in frankness and candour of the participants in the specific policy development process in question here is a valid argument in favour of maintenance of the exemption.

76. viii. Junior civil servants:

See paragraph 78 below.

77. ix. Relationship between Officials and Politicians:
x. How will the public use the information?

These factors are covered above at paragraphs 50 to 61.

78. xi. Names of civil servants:

The public authority has advanced arguments relevant to this factor, stating that it is very protective of releasing staff names other than those of very senior officers. The reason for this position is that in many cases their staff are at risk of harassment and press intrusion when their names are put in the public domain. However, these considerations are relevant to section 40(2) rather than to the balance of the public interest in connection with section 35(1)(a). This factor has not, therefore, been given any weight when considering the balance of the public interest.

Conclusion

79. The Commissioner recognises that the content, nature and context of the information itself contributes significant weight in favour of disclosure, particularly given the significance of the policy in question to those individuals directly impacted by it. However, the timing of the request is a highly significant factor here. The policy development process was ongoing at the time of the request and the Commissioner has recognised that the 'chilling effect' likely to result to this process through loss of frankness and candour would be counter to the public interest and in this case there is also a strong public interest in protecting the safe space for the development of this particular policy.

80. The public interest will favour disclosure of information relating to an ongoing policy development process only where the arguments favouring this are sufficiently compelling to outweigh the harm likely to result to the policy development process. In this case, the public interest in favour of disclosure on the basis of the content, nature and context of the information in question is not sufficient to tip the balance in favour of disclosure; taking into account the policy development process was ongoing at the time of the request. The Commissioner concludes that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

81. The Commissioner's decision is that the public authority dealt with the request in accordance with the Act in that it cited section 35(1)(a) correctly. However, the Commissioner also finds that the public authority failed to comply with the procedural requirements of sections 10(1) and 17(1) in its handling of the request.

Steps Required

82. The Commissioner requires no steps to be taken.

Right of Appeal

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83. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

84. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 23rd day of March 2009

Signed ……..

Steve Wood
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex:

Section 10

Section 10(1) provides that –

"…a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 17

Section 17(1) provides that –

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,
(b) specifies the exemption in question, and
(c) states (if that would not otherwise be apparent) why the exemption applies."

Section 35

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy,
(b) Ministerial communications,
(c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
(d) the operation of any Ministerial private office.

Section 40

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and
(b) either the first or the second condition below is satisfied."