



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

Case No. EA/2012/0259

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50443532
Dated: 26 November 2012**

Appellant:	EUROPEAN RAEIAN MOVEMENT
First Respondent:	INFORMATION COMMISSIONER
Second Respondent:	CABINET OFFICE
On the papers:	18 OCTOBER 2013
Date of decision:	6 DECEMBER 2013

Before

ROBIN CALLENDER SMITH
Judge

and

STEVE SHAW and NIGEL WATSON
Tribunal Members

Written submissions:

For the Appellant: Dr Jonathan Levy, Solicitor for the European Raelian Movement

For the 1st Respondent: Mr Adam Sowerbutts, Solicitor for the Information Commissioner

For the 2nd Respondent: Mr James Cornwell, Counsel instructed by TSol on behalf of The Cabinet Office

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
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Subject matter:

FOIA

Qualified exemptions

- International relations s.27
- Formulation or development of government policy s.35 (1) (a)
- Ministerial communications s.35 (1) (b)

DECISION OF THE FIRST-TIER TRIBUNAL

By a majority, the Tribunal upholds the decision notice dated 26 November 2012 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Holy See is a sovereign diplomatic entity and His Holiness the Pope is its Head. The UK has full diplomatic relations with the Holy See. The Pope has all the rights and privileges of a Head of State pursuant to the State Immunity Act 1978 and the Diplomatic Privileges Act 1964. The Pope therefore enjoys sovereign immunity from arrest and legal suit.
2. Between 16 September and 19 September 2010 the former Pope, Pope Benedict XVI, visited the UK. This was the first official visit by a Pope to the UK and the visit was accorded the status of a State Visit.
3. Some campaigners had threatened to “arrest” the Pope during this visit.

The request for information

4. On 1 November 2011 Dr Jonathan Levy, on behalf of the European Raelian Movement (ERM), wrote to the Cabinet Office in the following terms requesting information in relation to the Pope's visit:

The following information is requested including electronic documents such as emails, faxes and digital voicemails:

- (1). All policy documents pertaining to the Cabinet Office's strategy to deal with perceived legal threats to the Pope before, during and after his September 2010 visit to UK.
 - (2). Information pertaining to actions taken in regards to the above policy and strategy.
 - (3). All information specifically dealing with the Raelian Movement and the above mentioned lawsuit including collateral contact with the media, courts and the Holy See.
5. The Cabinet Office responded on 21 December 2012. It denied holding the requested information in relation to the Raelian Movement under (3) above but confirmed that the remainder was held.
 6. The Cabinet Office refused to provide that information citing the exemptions under FOIA, at sections 27(1) (a), (c) and (d) (international relations), 35(1)(a) and (b) (formulation of government policy, etc.) and 42(1) (legal professional privilege).
 7. On 28 December 2011 the Appellant sought an internal review of the Cabinet Office's refusal. On 31 January 2012 the Cabinet Office maintained its position following an internal review.

The complaint to the Information Commissioner

8. The Appellant wrote to the Commissioner on 5 April 2012 to complain about the Cabinet Office's handling of the Request.

9. Following correspondence with the Appellant it was agreed between the Commissioner and the ERM that the scope of the complaint was in relation to how the Cabinet Office had handled parts (1) and (2) only of the Request. The Appellant accepted the Cabinet Office's position that it did not hold information falling under part (3) of Request.
10. The Cabinet Office later provided the Appellant with a copy of some of the information within the scope of the Request, disclosure of which had originally been refused.
11. The Cabinet Office made detailed submissions to the Information Commissioner about why it considered that the exemptions under FOIA sections 27(1) and 35(1) were engaged and why the public interest favoured maintenance of the exemptions in relation to the remaining disputed information.
12. The Cabinet Office also claimed reliance on the exemption under s.27 (2) FOIA in relation to some of the requested information and ceased to rely on s.42 FOIA.
13. The Decision Notice, issued on 26 November 2012, was signed by the Deputy Commissioner, Mr Graham Smith.
14. He examined first the operation of s.27 FOIA in respect of international relations, setting out its provisions:-

27 International relations

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State,

...

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.

...

(5) In this section—

...

“State” includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.”

15. He noted that s.27 (1) focused on the effects of the disclosure of the information while s.27 (2) related to the circumstances under which it was obtained and the conditions placed on it by its supplier. It did not relate primarily to the disclosure of the information or the harm that might result from the disclosure. The Commissioner concluded that such information was confidential for as long as the State, organisation or court expected it to be so held.

16. He observed that the Cabinet Office had argued that the UK had full diplomatic relations with the Holy See and that the Pope was considered a full Head of State under UK law, including for the purposes of section 27 FOIA. The Cabinet Office had stated that its reliance on s.27 was

therefore not based in any way on the Pope’s role as Head of the Catholic church, but only on the likely prejudice to the UK’s foreign relations including, but not limited to, the Vatican.

17. The Commissioner had seen and considered the withheld information and had concluded either that UK interests abroad or the international relations of the UK would be likely to be prejudiced through disclosure or that such information was confidential information within the meaning of s.27 (2). On that basis he found that the exemption was engaged in relation to the withheld information and went on to consider the public interest test.

18. When requesting the internal review the Appellant had told the Cabinet Office that he disagreed with its view that disclosure “might prejudice foreign relations with the Vatican”. Arguing in favour of disclosure, the Appellant pointed out that the Pope’s visit was in the past, no future visits were immediately scheduled and, as a consequence, foreign affairs concerns had receded, favouring the public’s right to know what transpired.
19. The Cabinet Office had recognised the general public interest in openness in public affairs. It described the Pope’s visit as “an historic occasion” in which there was a high level of public interest. The Cabinet Office recognised the benefit in understanding how the Government had prepared for the visit.
20. The Cabinet Office’s view was that disclosure of the information would be likely to prejudice the UK’s relations with the Holy See and inhibit frankness and openness in future diplomatic exchanges with the Holy See and other states who would be less willing to share sensitive information with the UK in the future. Also other states would be less willing to arrange reciprocal state visits with the UK if information relating to those was released prematurely, damaging the U.K.’s ability to conduct normal diplomatic relations and further the national interest. The Cabinet Office maintained that it was not in the public interest to prejudice relations between the UK and other states and international partners.
21. The Commissioner accepted that it was strongly in the public interest that the UK enjoyed effective relations with foreign states and the public interest would be harmed if those relationships were harmed either through information ceasing to be provided or by discussions becoming less candid.
22. Account had been taken not only of the immediate impact on relations with the Holy See, but also the potential adverse effect on relations

with many other States across the world if the UK was seen to be disclosing information considered to have been shared or imparted in confidence. In the circumstances the Commissioner concluded that the Cabinet Office had correctly applied the exemption and was entitled to withhold the information.

23. In relation to s.35 FOIA and the formulation of government policy the legislation states:

35 Formulation of government policy, etc

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

(a) the formulation or development of government policy,

(b) Ministerial communications,

...

(5) In this section—

...

“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, ...”

24. The Commissioner found that the exemption was engaged in relation to both subsections that had been claimed. In terms of the public interest test, the Cabinet Office’s position was that Ministers had to be able to discuss policy freely and frankly and needed to be able to conduct rigorous and candid risk assessments of policies. Ministers and officials needed to be able to robustly assess options for dealing with potential legal challenges and take appropriate action accordingly “without the fear that their considerations would be made public prematurely.”

25. At the time of the request it was only just over two years after the visit and the policy discussions that had preceded it. Releasing such

information “so shortly after these policy discussions took place” would reduce the quality of Ministerial decision-making overall.

26. The Commissioner decided that in the particular circumstances of this case, the withheld information related to ministerial communications about government policy in relation to a Papal visit that had been controversial for a number of interest groups. He had considered the extent to which relevant information was already in the public domain and had then considered what purpose disclosure would serve and what the information at issue in this case would add to the information that was already available.

27. At the time of the request less than three years had passed since the relevant Ministerial discussions had taken place. The public interest in maintaining non-disclosure of the withheld information outweighed its disclosure.

The appeal to the Tribunal

28. The grounds of appeal focused particularly on the public interest test. The Appellant believed that too much deference had been granted to the position taken by the Cabinet Office. In terms of prejudicing future relations with the Holy See, and the UK government conducting diplomacy generally, the narrowness of the request should not have the adverse effects claimed.

29. The request simply sought information about an admitted Cabinet strategy to deflect civil and criminal legal process against the Pope during a very limited time period in September 2010.

30. That timeframe and duration was the only period during which the Pope would be vulnerable to service of process or even arrest. Once the Pope departed from the UK, service of process upon him or an attempt to arrest him would be virtually impossible.

31. Revealing the policies and practices specifically designed to shield the Pope from legal process during his state visit to the UK two years after the event could hardly harm UK diplomatic relations.
32. The Appellant surmised that the Pope was afraid of being sued for numerous crimes or civil wrongs and had asked the Cabinet for assistance in shielding himself from legal liability and that the Cabinet obliged in some manner it did not want to reveal. The Pope's circumstances were truly unique: his alleged crimes and wrongs stemmed not from state actions but from his role as Supreme Pontiff of the Catholic Church, and from ongoing sex abuse scandals and the social policies he preached which in the Appellant's opinion were repressive. To compare the Pope's civil and criminal liabilities to the likes of President Obama, President Mugabe or President Putin was, the Appellant said, disingenuous. The Pope's agenda in the UK during that visit served both state and religious purposes.
33. The Cabinet Office argument hinged on the possibility of offending the Pope and speculated that other heads of state might not want to visit the UK if details of strategies to protect the Pope from legal process were the subject of FOIA disclosure. The Appellant found that argument specious and contrary to public policy. If heads of state had violated the law or committed torts, they had adequate protection under the existing law including potential immunities. The Cabinet Office appeared to claim it could override the judicial process and engage in "secret circumvention of the courts in the name of being a good host".
34. The Appellant also believed that there had been an overly broad interpretation of s.35 FOIA. There did not appear to be actual ministerial communications involved but documents which somehow related to the Pope's visit which were discussed at the Ministerial level.
35. The passage of time was particularly significant. The visit had occurred in 2010, no further visits were planned by that Pope to the UK and any

protections or strategies undertaken to protect the Pope from legal process were “long moot”.

The questions for the Tribunal

36. The Tribunal had to decide whether the exemptions within s. 27 and s.35 had been correctly applied to withhold the requested information.

Evidence

37. There were open, redacted and closed written witness statements provided by the Cabinet Office – from Kate Alison Oakes (Deputy Director in the Economic and Domestic Affairs Secretariat responsible for Cabinet Committees, constitutional reform and home affairs policy) and Christopher George Edgar (HM Ambassador to the Republic of Uzbekistan and formally interim Ambassador to the Holy See having previously served as Head of the Government’s Papal Visit Unit responsible for the arrangements for the visit of His Holiness Pope Benedict XVI to the United Kingdom in September 2010) – the entirety of the withheld information and open and closed submissions from the Cabinet Office and the Commissioner.
38. Ms Oakes’ written evidence described in detail the operation of ministerial communications, particularly the operation of the Cabinet and Cabinet Committee system and the liaison between the Prime Minister’s Office (PMO) and other government departments.
39. She had no direct knowledge of the planning for the Papal visit of September 2010. She stated that if ministers and officials believed that their policy discussions, the form they took, or their absence would be revealed publicly so soon after the event it was obvious that the character of those discussions would change:

"In my experience, if Ministers could not rely on the record of their deliberations having a high level of protection against future disclosure, they would be very reluctant to express their views with frankness and in detail. They would be more guarded about what they said and less willing openly to debate difficult policy options for fear that they would be identified in public with a position they raised for the purposes of debate. They would be wary of treating potentially controversial issues in depth, in case these subsequently became the focus of public criticism at the expense of public understanding of the final policy decision. They would also be reluctant to have potentially controversial options committed to paper and analysed in detail. This would result in watered down discussion and a lower quality of decision-making. Public administration would be the poorer for this."

40. Mr Edgar's written evidence stated that, in his view, it was strongly likely that the relationship between the Holy See and the UK would be likely to be prejudiced by the disclosure of the material which the Appellant sought. The interests of the UK abroad and the promotion and protection by the UK of its interests abroad would also be prejudiced. He accepted that there was a public interest in raising awareness of how the government managed its diplomatic relations with foreign states and in greater understanding of the UK's relations with the Holy See. There was also a public interest in understanding how the government prepared for major public events involving visits by world leaders, such as the one by the Pope in September 2010, and in particular whether the government anticipated legal problems arising from the visit. He did not believe that the disclosure of the disputed information would add to the public's understanding of the government's view of the legal position of the Pope nor would it provide significant additional detail about the UK's conduct of diplomatic relations with the Holy See or other nations.

41. He noted that Pope Benedict XVI's visit to the UK was the first state visit by a Pope to the UK. Pope John Paul II had made a private pastoral visit to Great Britain in 1982. Pope Benedict XVI's visit was the culmination of more than eight years' detailed planning and during the General Election campaign in April 2010 the leaders of all three main

parties expressed support for the visit. At Paragraphs 11 and 12 of his open written witness statement he stated:

Both the Holy See and HM Government regarded the visit as a success but its success was not certain during the planning process. There was opposition to the visit: for example the British Humanist Association announced its opposition to the visit and it was widely reported that prominent atheists planned to stage an attempt to “arrest” His Holiness. Such an attempt would have had no legal foundation but it was clear that the aim would have been to embarrass His Holiness and his host, HM Government. In April 2010, in order to clarify the legal protections afforded to His Holiness during the visit, the Foreign and Commonwealth Office issued a statement explaining that, as Head of the Holy See, His Holiness was fully protected under the terms of the State Immunity Act 1978. In the event, demonstrations organised by opponents of the visit were low-key.

The Appellant is a representative of the European Raelian Movement (ERM). I understand that the Raelian movement was founded in 1973 in France by a former motor sport journalist, Claude Vorlihon, now known as Rael, and that the movement believes humans were created by extra-terrestrial beings, the Elohim, who had mastered genetic engineering. I also understand that, on 13 September 2010, a few days before the start of the visit, the ERM filed a lawsuit in the High Court, against Pope Benedict XVI, alleging (amongst other things) violation of international human rights laws and genocide, and stating that His Holiness and the Holy See had orchestrated a campaign of disinformation against the ERM, apparently as revenge for its reporting of these allegations.

42. Mr Edgar noted that the lawsuit was stayed and the freedom of information request to the Cabinet Office appeared to arise partly from that. Further, at Paragraphs 19 – 21 he stated:

State visits are considered to be diplomatic events of the highest order. Disclosure of this information would therefore be a breach of established diplomatic etiquette which entails the confidentiality of diplomatic exchanges. For that reason, disclosure would have the effect of damaging our relationship with the Holy See, who would be less willing to engage in frank discussions in confidence if they believed they could not trust the UK to maintain that confidence. This would make it more difficult for HMG to cooperate on matters of mutual interest where confidential consultations would normally be required...the prejudice that would arise would be that the Holy See would doubt whether it could trust the United Kingdom to maintain standards of diplomatic etiquette by preserving confidences in the future and the United Kingdom’s diplomats would

then have to take steps to reassure the Holy See. It is much easier to damage such a relationship than it would be to restore it. Our ambassador to the Holy See and diplomatic staff working with the Papal Nuncio's staff in London would be faced with the painstaking task of rebuilding the Holy See's trust in the United Kingdom's diplomatic bona fides. These confidence building measures would consist of working together to achieve common goals but this process would necessarily depend on the Holy See being willing to be involved in this work. A period of probation is inevitable, during which the Holy See would examine at each step whether it was willing to be involved in each initiative and how open it was willing to be. The Holy See would set the pace, and it is inevitable that there would be opportunity costs: some projects and activities we favour would not start or would start later than we would like to see as the Holy See re-balanced its diplomatic relationship with us.

There would also be damage to our reputation amongst other international partners. Other nations would also wonder whether they could rely on us to preserve the confidentiality of future diplomatic encounters. There would be a general concern among other nations that HM Government could not be trusted to protect diplomatic confidences. But there would also be particular impact on other international partners because the information relates to the planning of a state visit by a Head of State. Planning for a Head of State visit is especially sensitive for the visitor nation as it takes a number of risks. During the planning process, the visitor's team often sets out their assessment of how they can cooperate with the host to mutual advantage. To some degree this risk is symmetrical since the host nation also shares its objectives with the visitor's team. There are some types of vulnerability which are not symmetrical. These are issues on which the visitor feels vulnerable and seeks assurances from the host country...Disclosure of this information would, in effect, create a new balance of risk for visitor countries to take into account when preparing for Head of State visits. They could no longer assume that the discussions of the aims of the visit and their areas of concern would be protected by diplomatic norms.

Whatever steps United Kingdom diplomats took to reassure our partners that they could rely on us to preserve diplomatic confidences, it is unlikely that these would entirely remove the suspicion that we would be unable to protect sensitive information.

43. The Tribunal adopted its rigorous approach in considering the public interest when material or information is presented to it in a closed and confidential form that is not immediately available to any appellant,

save as redacted material. The observations and quotations noted above are from the open and not the closed, unredacted material.

Conclusion and remedy

44. The Tribunal notes and accepts that the UK has full diplomatic relations with the Holy See and that the Pope is considered a full Head of State under UK law. This includes issues within s. 27 FOIA.
45. The majority of the Tribunal (Judge Robin Callender Smith and Mr Steve Shaw) accept that reliance on s.27 is the strongest of the exemptions claimed by the Cabinet Office in this appeal.
46. As the Decision Notice highlighted (Paragraph 14), that reliance was not based on the Pope's role as Head of the Catholic Church, but on the likely prejudice to the UK's foreign relations including, but not limited to, those with the Holy See.
47. The Tribunal has been able to see the withheld information and the majority of the Tribunal is satisfied that both UK interests abroad and the international relations of the UK would be likely to be prejudiced through the disclosure of that withheld information. It also finds that the withheld information was confidential information within the meaning of s.27 (2) FOIA.
48. The majority of the Tribunal, while recognising that openness in itself is something which is in the public interest, weighs that against the public interest in maintaining good international relations and the fact that there is a strong public interest in ensuring that the UK enjoys effective relations with foreign states. As Mr Edgar points out in his witness statement (reproduced above at Paragraph 42):

State visits are considered to be diplomatic events of the highest order. Disclosure of this information would therefore be a breach of established diplomatic etiquette which entails the confidentiality of diplomatic exchanges. For that reason, disclosure would have the

effect of damaging our relationship with the Holy See, they would be less willing to engage in frank discussions in confidence if they believed they could not trust the UK to maintain that confidence.

49. In terms of s. 35 (1) (a) and (b) – and the small amount of information withheld by the Cabinet Office under that exemption – the majority of the Tribunal is satisfied that it does both reflect the formulation or development of government policy and can properly be classified as ministerial communications.

50. The Commissioner's finding that the exemption at section 35 (1) (b) should be the main plank of the operative exemption here is upheld.

51. While there is a public interest in openness and accountability and in increasing public understanding about the way in which government works, in the particular circumstances of this case the withheld information related to ministerial communications about government policy in relation to a Papal visit that was opposed by a number of different interest groups.

52. The Tribunal has noted that the Cabinet Office urged the Tribunal to adopt an approach of aggregation of the public interest elements within the two exemptions claimed and in the context of FOIA. While aggregation is the correct approach under the Environmental Information Regulations 2004,¹ the Tribunal is not persuaded that this is the correct approach under FOIA. It notes the Commissioner's view – in his submissions dated 28 September 2013 – that the public interest arguments for maintaining the exemption under FOIA must relate to the interest which that exemption protects.

53. In the interests of clarity, although the decisions in respect of each exemption are by a majority of the Tribunal, that majority decision has

¹ Case C-71/10 CJEU Ofcom v Information Commissioner 28 July 2011: <http://www.bailii.org/eu/cases/EUECJ/2011/C7110.html>

not been achieved by aggregating together the individual public interest issues in each exemption.

54. The Cabinet Office relied on the *obiter* comments at Paragraph 207 of *Evans v The Information Commissioner & Seven Government Departments* [2012].² The question of aggregation of the public interest for the purposes of FOIA was not a matter that was considered in any detail by the Upper Tribunal in *Evans*.

55. The Upper Tribunal's approach in that case to consider each of the public interest arguments in general terms, separately from the exemptions relied upon,³ appeared to have been a purely pragmatic one.

56. The approach which was taken in that case was taken because the public interest arguments before the Upper Tribunal were the same in respect of each exemption it was required to consider. The Upper Tribunal's approach simply avoided the need for those arguments to be repeated for each exemption.

57. The Tribunal notes that the Upper Tribunal, in adopting the "aggregated" approach to the balancing exercise of the public interest arguments, made it case-specific with its comment:

.... We conclude that the Commissioner was right to say in closing oral submissions that *in the circumstances of the present case*, as regards the exemptions claimed by the Departments, *such differences as exist will not make a difference to the outcome* [emphasis added]. When assessing the public interest balance for the purposes each exemption we take an approach under which we aggregate all public interest in nondisclosure. We reach our conclusion on the overall balance by assessing the weight of the cumulative effect against the weight we give to the public interest in disclosure.⁴

² *Evans v The Information Commissioner & Seven Government Departments* [2012] UKUT 313 (AAC) 2 Info LR 352.

³ *Evans* [124 – 214].

⁴ *Evans* [207].

58. Finally, in terms of the passage of time, it is correct that questions of confidentiality may change over time but the majority of the Tribunal do not find that sufficient time has elapsed taking the operative starting point against which the withheld information has to be gauged as the date of the original request, 1 November 2011.

59. The minority view (Mr Nigel Watson) was that the information held was of such a nature that the likelihood that disclosure would either prejudice relationships with the Holy See or other States was low for the former and very low for the latter.

60. The public interest would best be served in this instance by seeing how the government dealt with the issues involved. Therefore - in the minority view - the exemption claimed under s. 27 (2) FOIA was not engaged. In terms of s.35 (1) (a) and (b) the minority view was that the information should not be regarded as the formulation or development of government policy.

61. For all these reasons the majority of the Tribunal dismisses the Appellant's appeal.

62. There is no order as to costs.

Robin Callender Smith

Judge

6 December 2013